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Articles

Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought

Carl Landauer*

I. INTRODUCTION

Erwin Panofsky, the émigré art historian often credited with revolutionizing American art history, gave a Princeton commencement address in 1953 with a title that seemed perfectly suited to the obligatory incantations of graduation ceremonies: *In Defense of the Ivory Tower*.² In it Panofsky distinguished the scholar occupying the ivory tower from those engaged in social activity on

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2. Erwin Panofsky, *In Defense of the Ivory Tower*, 1 CENTENNIAL REV. ARTS & SCI. 111 (1957).

the ground below. Nevertheless, the occupant of the ivory tower was not entirely distanced from the social life of the community. Ultimately, the scholar functioned for Panofsky as a sort of “watchman”: “Whenever the occupant perceives a danger to life or liberty, he has the opportunity, even the duty, not only to ‘signal along the line from summit to summit’ but also to yell, on the slim chance of being heard, to those on the ground.”³ Panofsky went on to enumerate scholars who had sounded the alarm: Socrates, Erasmus, Sebastian Castellio, Voltaire, Theodor Mommsen, the seven professors at Göttingen, and Albert Einstein. All had “raised their voices when they felt that there was a danger to liberty.”⁴ Although Panofsky’s address was delivered at the height of the McCarthy era, one had to read between the lines to detect a critique of his contemporary America—he was not shouting very loudly himself. But it is nevertheless clear that Panofsky’s image of the scholar in the ivory tower was one of general disconnectedness from political activity, except at extreme moments in the life of the community.

I mention Panofsky—the historian of medieval and Renaissance art and proponent of iconology—because his formulation of the scholar in the ivory tower seems to have an interesting resonance with Learned Hand’s image of the judge. Just like Panofsky’s scholar, Hand cautioned the judge to interfere as little as possible with the political process. Hand, the champion of judicial restraint, is a familiar story, but Hand’s mind—as is clear in a number of essays in *The Spirit of Liberty*—was also occupied with the threat of totalitarianism. He worried about the impact of mass culture, calling the art of publicity a “black art,”⁵ and stated that “[w]e need not look to Russia and Germany, or to their pathetic Italian imitator; we need not leave home at all”⁶ to confront the work of mass suggestion. Against the totalitarian threat to liberal society, Hand posited the importance of free inquiry, which would finally be the rock upon which totalitarian seductions would founder. In *The Supreme Court of the United States*,⁷ Paul Freund quotes Hand to the effect that “a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save.”⁸

3. *Id.* at 121.

4. *Id.*

5. LEARNED HAND, *Mr. Justice Brandeis* (1942), in *THE SPIRIT OF LIBERTY* 155, 161 (Irving Dilliard ed., 1952).

6. LEARNED HAND, *Liberty* (1941), in *THE SPIRIT OF LIBERTY*, *supra* note 5, at 144, 149. On Hand’s concerns with the domestic totalitarian threat, see Carl Landauer, *Scholar, Craftsman, & Priest: Learned Hand’s Self-Imaging*, 3 *YALE J.L. & HUMAN.* 231, 255-57 (1991).

7. PAUL FREUND, *THE SUPREME COURT OF THE UNITED STATES: ITS BUSINESS, PURPOSES, AND PERFORMANCE* (1961).

8. *Id.* at 88 (quoting LEARNED HAND, *The Contribution of an Independent Judiciary to*

This does not suggest an effective role for the judge in the maintenance of a free society. And yet, as one reads Hand's various essays, it becomes clear that Hand viewed judging as a liberal art and, as such, part of the defense of the liberal state. Just like Panofsky's denizens of the ivory tower, Hand's judge was not meant to interfere with the flow of the political life. But in extreme danger, Panofsky's scholar and Hand's judge were needed.

The extreme danger in the postwar imagination was, of course, totalitarianism. During the war, the term was still enough of a neologism that Max Lerner put quotation marks around it in the title of one of his essays reproduced in *Ideas for the Ice Age*.⁹ The quotation marks would quickly disappear, and a belief in the commonality of Hitler and Stalin's states became a centerpiece of postwar political and historical thought. One of the great monuments to the postwar obsession with totalitarianism is, of course, Hannah Arendt's *The Origins of Totalitarianism*, with its social and structural analysis of totalitarian growth in modern society.¹⁰ But perhaps more interesting as a record is the interdisciplinary conference on totalitarianism convened by the American Academy of Arts and Sciences in the spring of 1953, a gathering that included the likes of Karl Deutsch, Erik Erikson, George F. Kennan, Carl Friedrich, David Riesman, Hannah Arendt, and Harold Laswell, among others. Despite the debates back and forth throughout the sessions—Did Christianity provide soil for the growth of totalitarianism? What is the importance of ideology to totalitarianism?—the conference embodied the need to arrive at an economic, psychological, social, and political composite portrait of the most important and threatening of modern phenomena. In his introduction to the conference's published papers, Carl Friedrich emphasized totalitarianism's newness, noting that the phenomenon had “burst upon mankind more or less unexpected and unannounced.”¹¹ It was, he thought, “striking, indeed, that none of the outstanding scholars in history, law, and the social sciences discerned what was ahead. Neither Veblen nor Durkheim, Jellinek nor Duguit, Max Weber nor

Civilization (1944), in *THE SPIRIT OF LIBERTY*, *supra* note 5, at 172, 181 (emphasis in original)).

9. MAX LERNER, *Democratic Ends and “Totalitarian” Means*, in *IDEAS FOR THE ICE AGE* 34 (1941). After citing a discussion of the “totalitarian state” in a 1933 article in the *Christian Century*, Edward Purcell writes that the “term became common after 1935, and its increasingly frequent use was significant. It provided a convenient term, especially after 1939, under which to join communism, fascism, and Nazism.” EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 135 (1973).

10. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1976) (1951).

11. Carl J. Friedrich, *The Problem of Totalitarianism—An Introduction*, *TOTALITARIANISM* 1, 1 (Carl J. Friedrich ed., Univ. Library ed. 1964) (1954).

Pareto sensed the trend which culminated in totalitarianism.”¹² Newness and importance were coupled to suggest that totalitarianism was tangled with the modern.

If totalitarianism was intricately bound up with the modern, its threat was palpable, and clearly its shadow was a constant presence in postwar social and political thought. And although I will refer to specific threats framed in terms of Nazism or Stalinism, it is the unified notion of a “totalitarianism” as a phenomenon of the twentieth century that drew so much attention.¹³ In this Article I will analyze anxieties about totalitarianism as one of the main thematics of political and other social thought, as a thematic that brought together the neo-Freudian and anthropological analysis of the psychology of modern American culture as ultimately pathological, a pathology posing a totalitarian threat. In the first part of my Article, then, I will examine a number of the major figures in social and political thought, scholars who appear again and again in footnotes during the period following the war until roughly 1960—and most of whom continue to do so today. Then, I will turn to legal scholars who are familiar reference points in legal literature. By comparison, the legal scholars, although they too might make shadowy references to totalitarianism, are not possessed by the same anxiousness about an anxious society.

I will argue that this difference between social and legal thought is ultimately a difference founded in two different institutional cultures. In the end, the legal culture I will describe was characterized by an often internalized attachment to government, and tended to see even its most academic law review writing as policy writing. This legal culture views government as efficacious rather than susceptible to the mood swings of a pathological society. This is part of the confident strain in legal writing, as opposed to the anxiousness of social science writing. I will argue that there is a confident identification with government that, if often implicit, is one of the marks of legal writing not only in the postwar period of roughly 1945 to 1960 but also today. And I will offer an analysis of the separateness of legal thought. If other scholars, including Morton Horwitz, Richard Primus, Neil Duxbury, and Gary Peller, see postwar legal writers as reacting to the threat of totalitarianism and closely aligned in spirit with their peers in the social sciences, I would like instead to identify a separate style in legal scholarship that not

12. *Id.*

13. Here Abbott Gleason’s excellent study of the development of totalitarianism as an idea provides a strong sense of my subject matter, especially in his chapters that address the immediate postwar period. See ABBOTT GLEASON, *TOTALITARIANISM: THE INNER HISTORY OF THE COLD WAR* (1995).

only made it less concerned with totalitarianism and the pathological culture of America during the postwar period but also continues to characterize it today.

Largely via Edward Purcell's narrative in *The Crisis of Democratic Theory* about the impact of the totalitarian threat upon legal realism's separation of the "is" and the "ought,"¹⁴ Morton Horwitz has identified the "varying interpretations of and reactions to the horrors of fascism, Nazism, and Stalinism" as one of the three major influences that "shaped" postwar legal thought.¹⁵ Horwitz tells his readers that Americans, struck by the tragedies that befell democracy in Europe, developed a preoccupation with the rule and nature of democracy, and that preoccupation more than any other defined the subject matter of postwar political and legal writing.¹⁶ Horwitz splits these postwar writings into two vying interpretations of the strength of democracy in the United States. The first was a "version of consensus theory which sought to portray the existence of a basic societal consensus on fundamental values" (here he is thinking of the likes of Daniel Boorstin, Arthur Schlesinger, Jr., and Louis Hartz), and the second, an "equilibrium theory that posited that agreement would emerge after trading among different and competing groups"¹⁷ (here he is thinking of figures like Robert Dahl, influenced by Joseph Schumpeter's *Capitalism, Socialism and Democracy*¹⁸). For Horwitz, the two schools coalesced around a common belief in underlying consensus. In a sense, they represented two different forms of consensus theory.¹⁹

Despite Horwitz's subtlety, this allows him to move back towards the easy critique of consensus theory first offered by John Higham's *The Cult of the "American Consensus"* in 1959.²⁰ Horwitz's move

14. See PURCELL, *supra* note 9, at 7.

15. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 247 (1992).

16. See *id.* at 255.

17. *Id.* at 251.

18. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942).

19. After quoting Dahl to the effect that "[p]rior to politics . . . is the underlying consensus on policy that usually exists in the society among a predominant portion of the politically active members," HORWITZ, *supra* note 15, at 256 (quoting ROBERT DAHL, *A PREFACE TO DEMOCRATIC THEORY* 132-33 (1956)), Horwitz goes on to state:

Here we see the close relationship between interest group pluralist theories of politics modeled on equilibrium theories in economics and consensus theories that sought to find fundamental agreement over ends and values. Whether rooted in a picture of a relatively conflict-free American history or of a non-ideological "American mind," consensus theories buttressed the view either that there could be agreement on rules of the game independently of ends or else that all politics involved simply the non-ideological question of the most efficacious means for arriving at undisputed ends.

Id. at 257.

20. John Higham, *The Cult of the "American Consensus,"* 27 COMMENTARY 93 (1959).

suggests questions about the degree to which an emphasis on consensus helps us to understand the response to totalitarianism in American postwar social and political thought, as well as developments in postwar legal thought. But I would rather focus attention on the expression of anxiety about totalitarianism in social and political thought and the extent to which that expression is mirrored in postwar legal thought.

To support my claim that the social and political science writing of the postwar period was fraught with worry about totalitarianism and its organic relationship to modern society, I will argue that postwar political and other social scientists turned to a blend of neo-Freudianism and anthropology to help produce a psychopathology of modern culture, and quite explicitly modern American culture. Their shared analysis suggests a neurotic society that could easily make the totalitarian turn: Mass society was a step away from totalitarian society. Significantly, this threat was viewed alternatively as an oligarchic threat coming from above, or as a mob threat coming from below, and it was framed as a threat coming principally from the left or as a threat coming principally from the right.²¹ But the anxiety in social and political science writing was palpable and very much center-stage. In contrast to the centrality of totalitarian anxieties in the social and political science writing, I have not found such deep-seated worries preoccupying postwar legal writers.

Various legal scholars, including Morton Horwitz,²² Laura Kalman,²³ and Gary Peller,²⁴ have drawn from Edward Purcell's argument in *The Crisis of Democratic Theory* that Nazism created a crisis for the scientific is/ought separation of legal realism, and they have seen this crisis as formative for the development of legal thought in the 1950s. Richard Primus has provided an extended analysis of the impact of totalitarianism on postwar constitutional thought and has carefully followed its path in the turn to human rights, a renewed interest in morality and its "counterpoint," and a growth of an anti-ideological skepticism.²⁵ What is interesting is that

21. My suggestion of top-down and bottom-up threats seen as coming from the left or the right is roughly modeled after Richard Parker's fourfold grid: He posits a liberal and republican split in constitutional rhetoric that is again split into a conservative and populist republican split. In his book, *"Here, the People Rule": A Constitutional Populist Manifesto*, Parker focuses on the populist/conservative rhetorical divide, but that divide is only half of the larger structure that is part of his constitutional analysis and that he has used to frame his constitutional law teaching. See RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994).

22. See HORWITZ, *supra* note 15, at 247.

23. See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 41 (1996).

24. See Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REFORM 561 (1988).

25. See Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar*

many of these responses to the totalitarian example are not accompanied by the psychopathology that characterizes the culture of the social and political sciences as well as their fearful expression. Rather, many of the postwar jurisprudential developments, such as the turn to process or to neutrality, may have grappled with totalitarianism as a problem that had to be addressed by legal thought—the old legal realism just wouldn’t do—but they did not grapple with totalitarianism as a dire threat to American society. There were, of course, legal writers who expressed fear of totalitarianism, particularly Supreme Court Justice Robert Jackson, and those fears were unquestionably a part of postwar civil liberties jurisprudence. But, overall, the worries expressed elsewhere were left mostly unexpressed in legal thought.

We have, of course, learned to see presence in absence. To explain absence as presence, one may turn, for example, to Anna Freud’s analysis of “denial” as one of the key defense mechanisms of the ego, to the Derridean interest in absence as presence, and even to the most mundane observation that the unstated may often be too obvious to state explicitly. I will argue, however, that the real source of this difference between social and legal thought stems from the institutional culture of postwar legal thinking. In part, it derives from paired worldly and otherworldly detachments from the anxiety of totalitarianism. The worldliness often results from simple biography—the “New Deal lawyers” described in Peter Irons’s book of that title²⁶ filled the postwar bench and law school faculty, and they brought with them in their transition from governance an attachment to the positive role of government and the importance of the administrative state. Coupled with this worldly experience was the otherworldly culture of the bench and the law school that legal realism seemed unable finally to overcome—or rather into which legal realism transmogrified.²⁷ This priestly posture²⁸ signified an inward look at the judiciary and its values. If Lon Fuller worried about early twentieth-century German legal scholarship contributing to the rise of the Nazis,²⁹ his argument only underscores the

Constitutional Thought, 106 YALE L.J. 423 (1996).

26. PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982).

27. See Peller, *supra* note 24.

28. At the end of my article on Learned Hand, I suggest that the resonance of his deployment of self-images of scholar, craftsman, and priest had much to do with his reputation. See Landauer, *supra* note 6, at 262.

29. See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). Richard Primus writes that “Hart and Fuller both took as their point of departure the question of how legal systems should deal with the problem of Nazism.” Primus, *supra* note 25, at 432.

characteristic self-absorption of legal writing.³⁰ All of the social upheaval and psychological dislocations that are so central to social and political science writing were ultimately missing from the legal writing of the postwar period.

In my conclusion to this Article, I will turn to Laura Kalman's *The Strange Career of Legal Liberalism*, and to her depiction of legal liberals' faith in the courts' ability to improve society. Kalman's story—this is the “strangeness” of the career—traces an oscillation in which legal liberalism falls victim to law and economics and critical legal studies, reemerges in the turn to history and the enchantment with republicanism, and finally seems to disappear with the growth of a more truly interdisciplinary postmodernism. I suggest that if we broaden Kalman's vision of legal liberalism beyond an engagement with the courts, particularly the Supreme Court, to a more general belief in the country's political institutions—or at least a faith in their reformability—we may find that the core values of legal scholarship are not quite as subject to the various reversals described by Kalman.

Duncan Kennedy's book, *A Critique of Adjudication (fin de siècle)*,³¹ provides an example of how mired even critical legal studies has been in the traditional values of our legal culture. There Kennedy—from the perspective of what he describes as a left “modernism/postmodernism”—makes an explicitly *internal* critique of adjudication. As he explains, he is attacking adjudication from within, and since the attack is from within, he demonstrates a very traditional legal academic attachment to adjudication. In discussing the place of ideology as well as doctrine in judicial decision making, Kennedy writes of the importance of “intelligentsias” to the development of ideologies—and clearly for Kennedy, the law professor has a role in the policy production of the intelligentsia. In an important sense, Kennedy is making explicit the core argument of this Article: If the postwar legal academy felt close to the political institutions of the country, it continues to do so by believing in its own involvement in the nation's policy production. Kennedy knows that he is no longer an *enfant*, but it turns out he may never have been that *terrible*.

Ultimately, the self-proclaimed heirs of the New Deal are not alone. When the *Yale Law Journal* published a two-issue symposium entitled *The Legacy of the New Deal: Problems and Possibilities in the Administrative State*³² in 1983, it came as no surprise that Bruce

30. Of course, legal writers may not be entirely alone. The philosopher Ernst Cassirer in his *Myth of the State* sees philosophical determinism as the key to National Socialism. See generally ERNST CASSIRER, *THE MYTH OF THE STATE* (1946).

31. DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* (1997).

32. *Symposium: The Legacy of the New Deal: Problems and Possibilities in the*

Ackerman's *Foreword* spoke fondly of "activist lawyering."³³ But if Ackerman so clearly identifies with an active role in the regulatory state, Duncan Kennedy, even in "critique," exhibits the same confidence in the policy role of the legal academic. I will end this Article by using Kennedy as an example of the underlying belief in the legal academic community that the law school is one of the country's political institutions, confirming Robert Post's observation that legal academics are "apt to confuse [their] truth with power."³⁴ Thus, if I have suggested that postwar legal writers exhibited less fear of the emergence of a totalitarian state than their peers elsewhere in the university, it is because of their more positive view of the country's political institutions and ultimately because of their confidence that the law school numbered among those institutions.

II. SOCIAL AND POLITICAL THOUGHT AND THE INFLUENCE OF ANXIETY

In this part, I will turn to a range of social and political science writers who created the academic *lingua franca* of the postwar period and have remained reference points today, if often as foils for post-1950s thinking. In the postwar period they were constant reference points for each other and for other scholars. But, as I will suggest, their own endnotes are filled with a confluence of neo-Freudians and the generation of cultural anthropologists trained at Columbia by Franz Boaz. For them, modern society in the United States was pathological, and its myth-laden irrationalism raised the threat of a totalitarian society. In this anxious mood, many social and political scientists turned to Tocqueville and Madison as means of dealing with the tyranny of opinion in the new mass culture—hence the postwar revivals of both Tocqueville and Madison. But those revivals are only defensive symbols of a significant anxious strain in social thought. Totalitarianism was not only a Cold War threat posed from abroad; it was also a threat posed from within.

A. Was the Vital Centered?

In the historiography of the postwar period, liberalism and conservatism are inextricably intertwined—what else could the "vital center" mean? So, for example, Richard Pells called his book on the intellectuals of the 1940s and 1950s *The Liberal Mind in a*

Administrative State, 92 YALE L.J. 1083 (1983).

33. Bruce A. Ackerman, *Foreword: Law in an Activist State*, 92 YALE L.J. 1083, 1088-94 (1983).

34. Robert Post, *Lani Guinier, Joseph Biden, and the Vocation of Legal Scholarship*, 11 CONST. COMMENTARY 185, 195 (1994).

Conservative Age,³⁵ and Marian Morton subtitled her book on Arthur Schlesinger, Louis Hartz, Daniel Boorstin, Edmund Morgan, and Richard Hofstadter, *Liberal Historians in a Conservative Mood*.³⁶ Indeed, Pells observed, consensus theory seemed to blend imperceptibly into the ideas of “those in the burgeoning American Studies movement who undertook an interdisciplinary quest for the national ‘character’.”³⁷ The American exceptionalism of the emerging American Studies field, the exceptionalism of R.W.B. Lewis’s *The American Adam*,³⁸ Henry Nash Smith’s *Virgin Land*,³⁹ and Perry Miller’s two-volume *The New England Mind*,⁴⁰ shared family traits with the American exceptionalism of the so-called consensus historians and like-minded sociologists.⁴¹

Although these observations have a fair degree of truth, the interesting part of the story is less the tale of consensus theory as complacency than that of consensus theory as anxiety. Although Pells writes that “Hartz and Hofstadter were neither pleased with nor complacent about the values they perceived as dominant in American life,”⁴² he ultimately identifies them as exceptions who maintained “their intellectual independence at a time when many writers—scorning affiliations with a movement or class—had become partisans of and propagandists for the nation as a whole.”⁴³ I would like to suggest, however, that Hartz and Hofstadter were hardly alone. If Daniel Boorstin’s *The Genius of American Politics*⁴⁴ was as

35. RICHARD H. PELLs, *THE LIBERAL MIND IN A CONSERVATIVE AGE: AMERICAN INTELLECTUALS IN THE 1940S AND 1950S* (1985).

36. MARIAN J. MORTON, *THE TERRORS OF IDEOLOGICAL POLITICS: LIBERAL HISTORIANS IN A CONSERVATIVE MOOD* (1972). Although I suggest certain common traits in the thought of a very broad range of social and political scientists, I do not subscribe to some of the commonplaces of identifying a “consensus history.” In my view, not only is Boorstin’s devotion to the consensus he identified quite distant from the critical tenor of Louis Hartz’s Lockean America, but, as I will argue, the critical and the anxious were generally much more significant aspects of the narratives usually described as “consensus history” than often suggested. See DANIEL J. BOORSTIN, *THE GENIUS OF AMERICAN POLITICS* (1953); LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* 306, 308 (Harcourt Brace 1991) (1955).

37. PELLs, *supra* note 35, at 149.

38. R.W.B. LEWIS, *THE AMERICAN ADAM: INNOCENCE, TRAGEDY, AND TRADITION IN THE NINETEENTH CENTURY* (1955).

39. HENRY NASH SMITH, *VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH* (1950).

40. PERRY MILLER, *THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY* (1954); PERRY MILLER, *THE NEW ENGLAND MIND: FROM COLONY TO PROVINCE* (1953).

41. See PELLs, *supra* note 35, at 149-50.

42. *Id.* at 162. Peter Novick makes a similar point about the critical edge to Hofstadter and Hartz. See PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* 334 (1988).

43. PELLs, *supra* note 35, at 162.

44. BOORSTIN, *supra* note 36. In this context it is, however, important to remember Boorstin’s expressions of embattlement against communism domestically in his testimony before the House Committee on Un-American Activities in 1953. As quoted by Peter Novick,

celebratory as its title, other social and political thinkers of the postwar period—even those commonly consigned to the consensus school—were driven by fear, and that fear represented a vital part of their intellectual energy.

Arthur Schlesinger, despite his present association with “complacency,” was quite serious about the title of his chapter “Politics in an Age of Anxiety” in *The Vital Center*.⁴⁵ We may feel assured, he tells us, that the “United States still has buffers between itself and the anxieties of our age: buffers of time, distance, of natural wealth, of national ingenuity, of a stubborn tradition of hope.”⁴⁶ Indeed, the “world tragedy still has the flickering unreality of a motion picture,” holding our attention only when it is in sight, “but, lingering over the familiar milkshake in the bright drugstore, we forget the nightmare in the resurgence of warmth and comfort.”⁴⁷ Yet, for Schlesinger, the nightmare is undeniable. If *The Vital Center* is known for engaging unabashedly in Cold War apologetics, the “anxiety” of Schlesinger’s chapter title refers in large part to the endemic anxieties of modern society.⁴⁸

With multiple references to Schumpeter’s *Capitalism, Socialism and Democracy*, Schlesinger explains that the flip side of the “liberation of energy under capitalism” is debilitation.⁴⁹ “Organization,” he explained, “impersonalizes all it touches; and, with the loss of personality, ownership loses its ability to command vital loyalties.”⁵⁰ Schlesinger turns in his next chapter to Erich Fromm’s *Escape from Freedom* with its argument that the freedoms of modern society are anxiety-producing, triggering, in those disposed to it, a rush to the relative comforts of a totalitarian state.⁵¹ Drawing from Fromm, Schlesinger came to assert that

Boorstin spoke of his religious activities because he thought “religion is a bulwark against Communism” and of his teaching and his writing as representing another “form of [his] opposition.” THIRTY YEARS OF TREASON: EXCERPTS FROM HEARINGS BEFORE THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1938-1968, at 601-12 (Eric Bentley ed., 1971), quoted in NOVICK, *supra* note 42, at 328.

45. ARTHUR M. SCHLESINGER, JR., *THE VITAL CENTER: THE POLITICS OF FREEDOM* 1 (Da Capo Press 1988) (1949).

46. *Id.*

47. *Id.* at 2.

48. Schlesinger explains:

Industrialism, at the same time that it released vast new energies, imposed on the world a sinister new structure of relationships. The result was to give potent weapons to the pride and the greed of man, the sadism and the masochism, the ecstasy in power and the ecstasy in submission; and it thereby increased man’s sense of guilt. The result was to create problems of organization to which man has not risen and which threaten to engulf him; and it thereby multiplied man’s anxieties.

Id. at 5-6.

49. *Id.* at 26 (citing SCHUMPETER, *supra* note 18).

50. *Id.*

51. See *id.* at 52-54 (discussing ERICH FROMM, *ESCAPE FROM FREEDOM* (1941)).

totalitarianism “has risen in specific response to this fear of freedom.”⁵²

This was, of course, all standard fare. That, in fact, is one of the things that makes *The Vital Center* so interesting. It is a ragout of references that one sees over and over again in the social thought of the 1950s. In fact, by the end of his slim volume, Schlesinger has touched almost all the right bases—Charles Beard and Harold Laski, Robert Michels and Karl Mannheim, Hannah Arendt and Reinhold Niebuhr, Vernon Parrington and Adolf Berle, Alexis de Tocqueville and E.H. Carr, Jean Paul Sartre and Albert Camus. *The Vital Center* is emblematic of a striking concentration of sources in much of social and political science writing of the 1950s. Endnotes of different scholars often seem interchangeable, whether in the casual use of Charles Beard as a foil or the heavy references to the work of the neo-Freudians. And that interchangeability in turn is an indication of thematic commonality, the elements perhaps rearranged like pieces of a kaleidoscope but in clearly recognizable patterns nonetheless.

B. The Neurotic Time of Our Personality

The basic presupposition of so much of postwar social and political writing—like much of the social science writing that had gone before it—was the dislocation and dysfunctionality engendered by modern industrial society. All of the past critiques, whether from the left or right, from Veblen or Durkheim, were replayed, except that many of the social pathologists of the postwar period focused increasingly on the psychological *responses* to modern society as pathological. It is in this context that the neo-Freudians with their historically contextualized psychopathology play such an important role. Karen Horney's *The Neurotic Personality of Our Time*,⁵³ the Frankfurt School-dominated, team-written *The Authoritarian Personality*,⁵⁴ as well as Fromm's *Escape from Freedom*, are common reference points. Similarly, Robert Nisbet tells us early on in *The Quest for Community* what he learned from Karen Horney, Erich Fromm, and Harry Stack Sullivan,⁵⁵ showing his interest not in Freud's universal

52. *Id.* at 53.

53. KAREN HORNEY, *THE NEUROTIC PERSONALITY OF OUR TIME* (1937).

54. T.W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (1950).

55. Nisbet writes:

From the writings of such psychiatrists as Karen Horney, Erich Fromm, and the late Harry Stack Sullivan we learn that in our culture, with its cherished values of individual self-reliance and self-sufficiency, surrounded by relationships which become ever more impersonal and by authorities which become ever more remote, there is a rising tendency, even among the “normal” elements of the population, toward increased feelings of aloneness and insecurity.

ROBERT A. NISBET, *THE QUEST FOR COMMUNITY* 17-18 (Oxford Univ. Press 1971) (1953).

diagnoses but quite specifically in the “typical neuroses of contemporary middle-class society,”⁵⁶ that is, in a culturally specific diagnosis of his era.

In *The Lonely Crowd*⁵⁷ David Riesman similarly draws heavily upon Erich Fromm and Erik Erikson for a developmental study of the “social character” of modern America.⁵⁸ After identifying the aim of his book as investigating an evolution in social character from the nineteenth to the twentieth century,⁵⁹ Riesman maintains that social character will be

familiar under one name or another to any of my readers who are acquainted with the writings of Erich Fromm, Abram Kardiner, Ruth Benedict, Margaret Mead, Geoffrey Gorer, Karen Horney, and many others who have written about social character in general, or the social character of different people and different times.⁶⁰

Here neo-Freudians and cultural anthropologists appear in an undifferentiated list. If the neo-Freudians were interesting because they offered a culturally contextualized Freud⁶¹—Freudianism as cultural anthropology—why not turn directly to the cultural anthropologists?

It is rather striking to see how often Karen Horney and Margaret Mead appear alongside each other in texts and footnotes.⁶² Horney and Mead appear in close succession in Max Lerner’s *America as a Civilization*⁶³ just as they are listed together in the second endnote of Willard Hurst’s *Law and the Conditions of Freedom in the Nineteenth-Century United States*.⁶⁴ In framing his chapter on “The

56. *Id.* at 18.

57. DAVID RIESMAN ET AL., *THE LONELY CROWD: A STUDY OF THE CHANGING AMERICAN CHARACTER* (Doubleday 1953) (1950).

58. In his discussion of *The Lonely Crowd*, Richard Pells notes that Riesman had trained with Fromm, and he mentions the importance of the neo-Freudians and the “emphasis among anthropologists like Margaret Mead, Ruth Benedict, and Clyde Kluckhohn on the relationship between culture and personality.” PELLs, *supra* note 35, at 238.

59. Riesman spoke of the “the way in which one kind of social character, which dominated America in the nineteenth century, is gradually being replaced by a social character of quite a different sort.” RIESMAN ET AL., *supra* note 57, at 17.

60. *Id.* at 18.

61. In part this was accomplished by psychologizing Marx, so it is interesting in this context that the first translation published in the United States of Marx’s early *Economic and Philosophical Manuscripts*—perhaps representing the most psychological Marx—was accompanied by an afterword by Erich Fromm. See MARX’S CONCEPT OF MAN (Erich Fromm ed. & T.B. Bottmore trans., 1961).

62. See, e.g., DAVID M. POTTER, *PEOPLE OF PLENTY: ECONOMIC ABUNDANCE AND THE AMERICAN CHARACTER* 32-72 (1954).

63. MAX LERNER, *AMERICA AS A CIVILIZATION: LIFE AND THOUGHT IN THE UNITED STATES TODAY* 632 (1957).

64. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 109 n.2 (1956).

Behavioral Scientists and National Character” in *People of Plenty*, David Potter was compelled to turn to Benedict, Kluckhohn, and Mead together with Fromm, Horney, and Adorno.⁶⁵ And as Potter works through their contributions to the study of national character and refers to the “analyses of Mead, Riesman, and Horney,”⁶⁶ disciplinary boundaries become invisible.⁶⁷

The search for national character, as in Lerner’s chapter on “National Character and the Civilization Process,” was closely tied to the interdisciplinary project of American Studies, to works like Henry Nash Smith’s *The Virgin Land*, Perry Miller’s *Errand into the Wilderness*,⁶⁸ and Marvin Meyer’s *The Jacksonian Persuasion*.⁶⁹ And as suggested by the subtitle of Marvin Meyer’s book—*Politics and Belief*—the study of national character was largely the study of national mythology at a time when the “myth and symbol” school was thriving in literary criticism. In fact, R.W.B. Lewis’s *The American Adam* is at once exemplary of the American Studies movement and of myth and symbol criticism. If Lewis instructed the intellectual historian to “look for the images and the ‘story’ that animate the ideas and are their imaginative and usually more compelling equivalent,”⁷⁰ he seemed to be following Richard Chase’s admonition not to see myth as a body of dogma or a world-view but rather to understand that “myth is a story, myth is narrative or poetic literature.”⁷¹ And yet, a world-view was exactly what the developing American Studies movement was after.⁷²

Nevertheless, identifying cultures as suffused with a guiding

65. See POTTER, *supra* note 62, at 32-72.

66. *Id.* at 67.

67. Similarly, Lerner strings together the names of Mead, Riesman, and Kluckhohn along with a series of other names, including Potter, Boorstin, and Hartz. In an interesting formulation, Lerner writes: “For the new approach to national character by anthropologists and psychiatrists, see as an example Ruth Benedict’s on Japan, *The Chrysanthemum and the Sword*.” LERNER, *supra* note 63, at 958-59.

68. PERRY MILLER, *ERRAND INTO THE WILDERNESS* (1956).

69. MARVIN MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEF* (1957). On the “interdisciplinary quest for the national ‘culture’” represented by the American Studies movement, see PELLIS, *supra* note 35, at 149-50.

70. LEWIS, *supra* note 38, at 3.

71. Richard Chase, *Notes on the Study of Myth*, 13 *PARTISAN REV.* 338, 339 (1946), reprinted in JOHN B. VICKERY, *MYTH AND LITERATURE: CONTEMPORARY THEORY AND PRACTICE* 67, 68 (1966). Frank Lentricchia describes Richard Chase’s *QUEST FOR MYTH* (1949) as one of the central influences on the myth and symbol school, along with Ernst Cassirer’s *ESSAY ON MAN* (1944) and Susanne Langer’s *PHILOSOPHY IN A NEW KEY* (1941). See FRANK LENTRICCHIA, *AFTER THE NEW CRITICISM* 4 (1980).

72. There is, of course, a close connection between the postwar development of American Studies and the Cold War. See, e.g., Michael Holzman, *The Ideological Origins of American Studies at Yale*, 40 *AM. STUD.* 71 (1999). Peter Novick also points out the ties between American Studies programs and the Cold War. See NOVICK, *supra* note 42, at 381. Despite the Cold War defense of American culture embedded in the American Studies movement, the culture it described was also fraught with anxiety.

mythology was not limited to American Studies practitioners. For example, political scientist R.M. MacIver opens his chapter on “The Myth of Authority” with an assertion of the mythic ground of all social relations.⁷³ Furthermore, he believed that the “central myth in the maintenance of any social system is the myth of authority”⁷⁴ and that the “sanctification of authority” results from the “accredited body of myths, and through the elaboration of the institutional structure.”⁷⁵ MacIver, in his discussion of myth, turns to some of the most prominent anthropologists of the century—Bronislaw Malinowski, Mead, Radcliffe-Brown, and even W.G.R. Rivers. But if MacIver appears to universalize—and consequently neutralize—myth, he is quite clear about the destructive mysticism of the Nazi myth-making, such as that of Alfred Rosenberg’s *Myth of the Twentieth Century*.⁷⁶ Totalitarian myth casts its own shadow.

If not all social theorists of the postwar period focused as sharply on the connection between myth and Nazism as Ernst Cassirer did in *The Myth of the State*,⁷⁷ one can locate a recurring motif in American social thought of the wrong-headedness and, ultimately, the destructiveness of political mythology. Richard Hofstadter’s *The American Political Tradition*,⁷⁸ for instance, stands as Hofstadter’s own latter-day rendition of Lytton Strachey’s *Eminent Victorians*,⁷⁹ similarly pointing to the hypocrisy and falsehoods underlying some of the proudest careers in American political culture. To that effect, Hofstadter entitled a chapter “Abraham Lincoln and the Self-Made Myth.”⁸⁰ And the chapter titles of Hofstadter’s *Age of Reform*⁸¹ include “The Folklore of Populism”⁸² and “The Agrarian Myth and Commercial Realities.”⁸³ Indeed, Hofstadter provides an example of a larger tendency in the social science literature toward examination of American ideology and mythology, each seemingly fraught with

73. “We have pointed out that all social relations—the whole texture and the very being of society—are myth-sustained, and that all changes of the social structure are mothered and nurtured by appropriate new myths.” R.M. MACIVER, *THE WEB OF GOVERNMENT* 39 (1947).

74. *Id.* at 42.

75. *Id.* at 43. Similarly, in the opening pages of his book, MacIver maintains that “[e]very society is held together by a myth-system, a complex of dominating thought-forms that determines and sustains all its activities.” *Id.* at 4.

76. *See id.* at 253 (citing ALFRED ROSENBERG, *DER MYTHUS DES 20. JAHRHUNDERTS: EINE WERTUNG DES SEELISCH-GEISTIGEN GESTALTENKAMPFE UNSERER ZEIT* (1934)).

77. CASSIRER, *supra* note 30.

78. RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION, AND THE MEN WHO MADE IT* (Vintage Books 1989) (1948).

79. LYTTON STRACHEY, *EMINENT VICTORIANS: CARDINAL MANNING, FLORENCE NIGHTINGALE, DR. ARNOLD, GENERAL GORDON* (1918).

80. *Id.* at 119-73.

81. RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955).

82. *Id.* at 60-93.

83. *Id.* at 23-59.

anxiety and ambivalence. Thus, for example, Perry Miller refers to the “anxiety and torment that inform productions of the late seventeenth and early eighteenth centuries,”⁸⁴ Meyers describes the “Jacksonian ambivalence toward the rising economic order,”⁸⁵ and Hofstadter speaks of the “deep-lying vein of anxiety” embedded in the apparent optimism of Populist thought.⁸⁶ Similarly, Louis Hartz, at the end of his *Liberal Tradition in America*, talks of “our own antiradical fetishism” and “irrational Lockianism.”⁸⁷ Clearly, American ideologies were psychologically driven and consequently psychologically troubled.

Social dislocation and cognitive dissonance populate the social and political science literature of the postwar period. As I have been suggesting, if these pathologies were viewed as the symptoms of social development, they were also considered the root causes of totalitarianism or some kindred dysfunctionality. If social dislocation or cognitive dissonance produced an irrational ideology that became an index of totalitarianism, totalitarianism in turn deployed its own machinery for inculcating that ideology. In that vein, Hannah Arendt devoted a section of *The Origins of Totalitarianism* to propaganda. “Totalitarian propaganda,” Arendt tells us, “perfects the techniques of mass propaganda, but it neither invents them nor originates their themes.”⁸⁸ Indeed, a good deal of scholarly attention was paid to the propaganda campaigns of World War I, such as Harold Laswell’s *Propaganda Technique in the World War* from 1927.⁸⁹ But over and over again, one hears that totalitarianism has perfected the modern techniques of propaganda. Thus, for example, Robert Nisbet writes about totalitarianism’s “approach based upon the arts of psychological manipulation—cajolery, flattery, bribery, mass identification with new images, and all the modern techniques of indoctrination.”⁹⁰ Irrationality brought us to the doorstep of totalitarianism, with its psychological manipulations. And there was little question that the totalitarian threat resembled the mind controls of our commercial culture: The mind control of the totalitarian state was closely akin to that of Vance Packard’s “hidden persuaders.”⁹¹

84. MILLER, *supra* note 68, at 15.

85. MEYERS, *supra* note 69, at 254.

86. HOFSTADTER, *supra* note 81, at 66.

87. HARTZ, *supra* note 36, at 306, 308.

88. ARENDT, *supra* note 10, at 351.

89. HAROLD D. LASSWELL, *PROPAGANDA TECHNIQUE IN THE WORLD WAR* (1927).

90. NISBET, *supra* note 55, at 194.

91. See VANCE PACKARD, *THE HIDDEN PERSUADERS* (1957). In this context it is interesting that Abbott Gleason writes on how the brainwashing of American prisoners of war during the Korean War was tied to the more general “enslavement of the helpless individual

C. Mass Culture and the Cultivation of Tocqueville and Madison

There was, it seems, no lack of sophistication on the part of Hitler's or Stalin's propagandists. But for Theodor Adorno, Max Horkheimer, and other members of the Frankfurt School, that sophistication was little more than the sophistication of modern industrial society. Hollywood and Nazi Germany worked on the same basic principles.⁹² Adorno and Horkheimer were particularly central figures in the burgeoning analysis of mass culture, which, although stretching back before the war to analyses of "public opinion" and the impact of radio and advertising, really took hold in the 1950s. "Mass culture" and "mass society" seem everywhere—the very thickness of Bernard Rosenberg and David Manning White's 1957 anthology *Mass Culture*, with its forty-nine essays from Siegfried Kracauer, Marshall McLuhan, Dwight Macdonald, Clement Greenberg, Paul Lazarsfeld, and Robert K. Merton, among others, is testimony to the expansiveness of the intellectual cottage industry consumed by the culture industry.⁹³ To these writers, mass society was making its presence felt everywhere—even in small-town America, as we learn about the dysfunctional defensive reactions of the small town to the emergence of mass culture in Arthur Vidich and Joseph Bensman's sociological study, *Small Town in Mass Society*.⁹⁴

Mass culture was mostly viewed as pathological,⁹⁵ and there were seemingly few voices resembling Daniel Lerner's attempt to say that mass culture is not as brutish as all that in his essay *Comfort and Fun*:

psyche" that was brought into American consciousness by David Riesman's *LONELY CROWD* (1950) and Vance Packard's *THE HIDDEN PERSUADERS* (1957). GLEASON, *supra* note 13, at 103. In his book about America's postwar paranoia, Timothy Melley also turns to Riesman and Packard, naming them in the same sentence in his preface. See TIMOTHY MELLEY, *EMPIRE OF CONSPIRACY: THE CULTURE OF PARANOIA IN POSTWAR AMERICA* at vii (2000).

92. See, e.g., MAX HORKHEIMER & THEODOR W. ADORNO, *The Culture Industry: Enlightenment as Mass Deception*, in *DIALECTIC OF ENLIGHTENMENT* 120 (John Cumming trans., Seabury Press 1972) (1944).

93. *MASS CULTURE: THE POPULAR ARTS IN AMERICA* (Bernard Rosenberg & David Manning White eds., 1964) (1957) [hereinafter *MASS CULTURE*].

94. ARTHUR J. VIDICH & JOSEPH BENSMAN, *SMALL TOWN IN MASS SOCIETY: CLASS, POWER AND RELIGION IN A RURAL COMMUNITY* (1958).

95. It is interesting to compare the pathology derived from neo-Freudianism to the political psychological work of Harold Laswell in his 1934 volume on *World Politics and Personal Insecurity*. In the final paragraph of Part III of his book, Laswell writes:

In these trying times to speak of political psychiatry does not imply the treatment of individual cases by psycho-therapy, however rewarding this would be in many instances. The main application of psychiatric method to politics is in devising expedients of mass management by means of significant symbols which induce the harmless discharge of collective insecurities, or abolish some of the recurring sources of stress in the patterns of institutional life.

HAROLD D. LASWELL, *WORLD POLITICS AND PERSONAL INSECURITY* 233 (1934), reprinted in HAROLD D. LASWELL ET AL., *A STUDY OF POWER* 285 (1950). Here we have a suggested course of therapy.

Morality in a Nice Society.⁹⁶ And part of the pathology Lerner and others saw was the demonstrable link between mass society and totalitarianism. Horkheimer and Adorno explain, for example, that “[i]n America [the radio] collects no fees from the public, and so has acquired the illusory form of disinterested, unbiased authority which suits Fascism admirably.”⁹⁷ For them, modern jazz is a way station to fascism, and the modern bourgeois individual in mass society is “already virtually a Nazi.”⁹⁸ C. Wright Mills would explain to us in *The Power Elite* that “[f]rom almost any angle of vision that we might assume, when we look upon the public, we realize that we have moved a considerable distance along the road to the mass society.”⁹⁹ He warned: “At the end of that road there is totalitarianism, as in Nazi Germany or in Communist Russia.”¹⁰⁰ In a similar vein, Bernard Rosenberg wrote in his introduction to *Mass Culture* that “mass culture threatens not merely to cretinize our taste, but to brutalize our senses while paving the way to totalitarianism.”¹⁰¹

A significant division among the psychopathologists of mass society was a divide over whether the diagnosis discloses a “power elite” manipulating mass society or a pathology initiated by the masses themselves.¹⁰² Those focusing on the “power elite” analyze the manipulation practiced by that elite. “Manipulation,” Mills tells us, “becomes a problem wherever men have power that is concentrated and willful but do not have authority, or when, for any reason, they do not wish to use their power openly. Then the powerful seek to rule without showing their powerfulness.”¹⁰³ Similarly, Horkheimer and Adorno in their analysis of the “culture industry” would talk of the “culture monopolies” and explain that they in turn “are weak and dependent” by comparison to the “real

96. Daniel Lerner, *Comfort & Fun: Morality in a Nice Society*, 27 AM. SCHOLAR 153 (1958). In a similar vein, David Manning White urged that “[t]here has been such a rehearsal of all that is ugly and bathetic in our popular arts by critics whose sincerity cannot be questioned that it is time that the other side of the coin be examined.” David Manning White, *Mass Culture in America: Another Point of View*, in MASS CULTURE, *supra* note 93, at 13, 21.

97. HORKHEIMER & ADORNO, *supra* note 92, at 159.

98. *Id.* at 155.

99. C. WRIGHT MILLS, *THE POWER ELITE* 304 (Oxford Univ. Press 1959) (1956).

100. *Id.*

101. Bernard Rosenberg, *Mass Culture in America*, in MASS CULTURE, *supra* note 93, at 3, 9.

102. Wilfred McClay similarly sees postwar analysis of mass society stretching from right to left, and when turning to the left he writes: “Intellectuals on the Left now saw in the specter of mass society a dangerous social potential for unparalleled forms of domination, as Hitler had just made vivid by his success in imposing his authority upon the German populace.” WILFRED M. MCCLAY, *THE MASTERLESS: SELF AND SOCIETY IN MODERN AMERICA* 219 (1994).

103. MILLS, *supra* note 99, at 317.

holders of power,” the more powerful sectors of industry.¹⁰⁴ And Dwight Macdonald observes flatly: “Mass Culture is imposed from above.”¹⁰⁵

One of the long-term voices announcing the threat of mass society was, of course, Walter Lippmann. In *The Public Philosophy*, Lippmann asserted: “Where mass opinion dominates the government, there is a morbid derangement of the true functions of power.”¹⁰⁶ And he used all of the words that suggest lack of control and the loss of equipoise: “derangement,” “passion,” “intoxication,” and “hatred.”¹⁰⁷ Richard Parker has recently provided a broad critique of this sort of anti-populist focus on the danger of the crowd in “*Here, the People Rule*.”¹⁰⁸ In part, Parker’s critique is a continuation of a suggestion in Mills’s *The Power Elite* that, following the conservative focus on the crowd in the French Revolution, liberals and socialists have come to hold similar beliefs.¹⁰⁹ Taken together, Mills tells us, “[f]rom Le Bon to Emil Lederer and Ortega y Gasset, they have held that the influence of the mass is unfortunately increasing.”¹¹⁰

In the American context, both Populism and populism (in upper and lower case) were cast in insidious terms, and here Hofstadter’s *Age of Reform* stands as the central text. Keeping Freud and the neo-Freudians in the background, Hofstadter’s book provided a psychoanalytic analysis of American reform movements, identifying their underlying fears and anxieties. And just as Populism grew out of uneasiness, Hofstadter believed that the “Progressive movement was the complaint of the unorganized against the consequences of organization.”¹¹¹ As he explained, fear and anxiety produce ugliness. Thus, for example, “[o]ne feature of the Populist conspiracy theory that has been generally overlooked is its frequent link with a kind of rhetorical anti-Semitism.”¹¹² No one in 1955 could miss the link Hofstadter was suggesting between American populism and fascism, a suggestion that was made more explicitly in Victor Ferkiss’s essay

104. HORKHEIMER & ADORNO, *supra* note 92, at 122.

105. Dwight Macdonald, *A Theory of Mass Culture*, 3 *DIAGENES* 1 (1953), reprinted in *MASS CULTURE*, *supra* note 93, at 59, 60. He goes on to explain that “[t]he Lords of *küsch*, in short, exploit the cultural needs of the masses in order to make a profit and/or to maintain their class rule—in Communist countries, only the second purpose obtains.” *Id.*

106. WALTER LIPPMANN, *THE PUBLIC PHILOSOPHY* 19 (1956).

107. See, e.g., *id.* at 24-25.

108. PARKER, *supra* note 21.

109. Mills writes: “During the twentieth century, liberal and even socialist thinkers have followed suit, with more explicit reference to what we have called the society of masses.” *MILLS*, *supra* note 99, at 309.

110. *Id.*

111. HOFSTADTER, *supra* note 81, at 216.

112. *Id.* at 77.

*Populist Influences in American Fascism.*¹¹³

Hofstadter's psycho-sociological pathology of American popular movements was reinforced by the collection of writings on McCarthyism that came out of a faculty seminar at Columbia in 1954 on political behavior, *The New American Right*,¹¹⁴ with essays by Daniel Bell, Richard Hofstadter, David Riesman and Nathan Glazer, Peter Viereck, Talcott Parsons, and Seymour Martin Lipset.¹¹⁵ The several authors saw the "new American right" of the McCarthy era as resulting from status anxieties, essentially as a psychological response to social movement. Again pairing psychology and anthropology—in this case Theodor Adorno and Margaret Mead—Richard Hofstadter talked about the "intense status concerns of present-day politics."¹¹⁶ In the same volume, Daniel Bell called McCarthyism one of the "ugly excesses" created by "status anxieties" in America.¹¹⁷ In his contribution, Seymour Martin Lipset described the impact on politics of "status anxieties" and explained that "political movements which have successfully appealed to status resentments have been irrational in character and have sought scapegoats which conveniently serve to symbolize the status threat."¹¹⁸ Similarly, Talcott Parsons argued that "McCarthyism is best understood as a symptom of the strains attendant on a deep-seated process of change in our society, rather than as a 'movement' presenting a policy or set of values for the American people to act on."¹¹⁹ If Peter Viereck, the self-proclaimed conservative of the group, voiced a reassuring observation that "America is not the Weimar Republic,"¹²⁰ the volume as a whole clearly depicted the seriousness of America's psychic illness, and, as Lipset insisted, the

113. Victor C. Ferkiss, *Populist Influences in American Fascism*, 10 W. POL. Q. 350, 372-73 (1957). There were, of course, many who came to the defense of Populism, and Peter Novick describes the split on Populism as fundamentally a divide between northeastern Jews on the one hand, and southern and midwestern gentiles on the other. See NOVICK, *supra* note 42, at 339.

114. THE NEW AMERICAN RIGHT (Daniel Bell ed., 1955), *republished with additional essays as THE RADICAL RIGHT* (Daniel Bell ed., 1964) [hereinafter RADICAL RIGHT]. McClay describes *The New American Right* as building on émigré anxieties about totalitarianism and expressing "a profound distrust and fear of the dangerous potential to be found in mass movements." MCCLAY, *supra* note 102, at 259.

115. Cf. PELLIS, *supra* note 35, at 154 (discussing Hofstadter, Bell, and Lipset's distrust of "mass enthusiasms").

116. Richard Hofstadter, *The Pseudo-Conservative Revolt*, in RADICAL RIGHT, *supra* note 114, at 75, 86.

117. Daniel Bell, *Interpretations of American Politics*, in RADICAL RIGHT, *supra* note 114, at 47, 73.

118. Seymour Martin Lipset, *The Sources of the "Radical Right,"* in RADICAL RIGHT, *supra* note 114, at 307, 309.

119. Talcott Parsons, *Social Strains in America*, in RADICAL RIGHT, *supra* note 114, at 209, 227.

120. Peter Viereck, *The Revolt Against the Elite*, in RADICAL RIGHT, *supra* note 114, at 161, 178.

“radical right agitation has facilitated the growth of practices which threaten to undermine the social fabric of democratic politics.”¹²¹ The connection between *The New American Right* and the psychological analysis of totalitarianism in *The Authoritarian Personality* and Hannah Arendt’s *The Origins of Totalitarianism* was unmistakable.

Anxieties about the threat to open society in a sense represent an earlier version of the now-tired republicanism/liberalism debate, as Walter Lippmann described his “hope” that “both liberty and democracy can be preserved before the one destroys the other.”¹²² The worry about the damage to liberal society from too much democracy brought about a Tocqueville revival.¹²³ J. Salwyn Schapiro, for example, published an essay entitled *Alexis de Tocqueville, Pioneer of Democratic Liberalism in France* in 1942, in which he focused on Tocqueville’s worries about the tyranny of the majority.¹²⁴ A version of this essay reappeared in his 1949 book, which, as its subtitle suggested, may have been principally a study of *Social Forces in England and France (1815-1870)*, but Schapiro’s overriding preoccupation with totalitarianism and the threat to liberalism was unmistakably apparent in the book’s presentist title, *Liberalism and the Challenge of Fascism*.¹²⁵ If Tocqueville was one of Schapiro’s liberal heroes, he quickly grew in significance in postwar social and political thought.¹²⁶

Tocqueville’s presence figures very prominently in postwar American thought and is closely connected to the critique of mass culture. In *The Decline of American Liberalism*, Arthur Ekirch uses Tocqueville to articulate his critique of what he saw as the illiberalism of Jacksonian democracy.¹²⁷ It is hardly surprising that

121. Lipset, *supra* note 118, at 307.

122. LIPPMANN, *supra* note 106, at 18.

123. Pells refers to the “rediscovered insights of Alexis de Tocqueville.” PELLIS, *supra* note 35, at 149. *See also, e.g.,* MCCLAY, *supra* note 102, at 235 (discussing the “extraordinary interest in Tocqueville” in the context of his discussion of the postwar critique of modernization).

124. J. Salwyn Schapiro, *Alexis de Tocqueville, Pioneer of Democratic Liberalism in France*, 57 POL. SCI. Q. 545 (1942), *reprinted in* J. SALWYN SCHAPIRO, *LIBERALISM AND THE CHALLENGE OF FASCISM: SOCIAL FORCES IN ENGLAND AND FRANCE* 290 (1949) [hereinafter SCHAPIRO, *LIBERALISM*].

125. The book included three chapters on “heralds of fascism”—Napoleon, Proudhon, and Carlyle—and posed John Stuart Mill and Tocqueville as the book’s heroes. *See* SCHAPIRO, *LIBERALISM*, *supra* note 124.

126. Although a number of scholars including McClay point to the appearance of the Knopf translation of *Democracy in America* in 1945, *see e.g.,* MCCLAY, *supra* note 102, at 235, they forget the attention that preceded it, such as GEORGE WILSON PIERSON, *TOCQUEVILLE & BEAUMONT IN AMERICA* (1938). *See* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., rev. by Francis Brown, corr. by Phillips Bradley, A.A. Knopf 1945) (1835).

127. *See* ARTHUR A. EKIRCH, JR., *THE DECLINE OF AMERICAN LIBERALISM* 73-94 (Atheneum 1973) (1955).

the Straussian team-written history of political philosophy that emerged in 1963 numbered Tocqueville as one of the thirty-three major figures in the history of political thought deserving of a chapter.¹²⁸ Marvin Zetterbaum's essay focused on the "problem of democracy" and Tocqueville's understanding that "[l]eft to its own devices, democracy is actually prone to the establishment of tyranny, whether of one over all, of the many over the few, or even of all over all."¹²⁹ On the final page of Max Lerner's chapter on "The Culture of Machine Living," where he discussed the tyranny of opinion, he turned to Tocqueville.¹³⁰

There are, of course, many Tocquevilles, and one can play games with *Democracy in America*, selecting one of Tocqueville's dramatic proclamations on one page and then finding its polar opposite expressed on another page. And there were many notions to appropriate in Tocqueville besides his focus on the "tyranny of opinion."¹³¹ But one cannot escape the significance of Tocqueville's democratic problematic for postwar social and political thought. For that reason, Tocqueville became a key to analyzing totalitarianism, so that, as Robert Nisbet asserted, "the genius of [Tocqueville's] analysis lies in the view of totalitarianism as something not historically 'abnormal' but as closely related to the very trends hailed as progressive in the nineteenth century."¹³²

The other figure marshaled to combat anxieties about popular energies and the threat of totalitarianism was James Madison. Madison also experienced a renaissance in the postwar period, and one of Madison's attractions was that he provided a way to dilute popular radicalism.¹³³ In his source book on American government, political scientist David Fellman introduced *The Federalist No. 10*, which increasingly became one of the core documents of American

128. See Marvin Zetterbaum, *Alexis de Tocqueville, 1805-1859*, in *HISTORY OF POLITICAL PHILOSOPHY* 715 (Leo Strauss & Joseph Cropsey eds., Univ. of Chicago Press 1981) (1963).

129. *Id.* at 726.

130. Lerner writes:

[A]s De Tocqueville saw, a society in which there is no recognized elite group to serve as the arbiter of morals, thought, and style is bound to be a formless one in which the ordinary person seeks to heal his insecurity by attuning himself to the "tyranny of opinion"—to what others do and say and what they think of him. He is ruled by imitation and prestige rather than a sense of his own worth.

LERNER, *supra* note 63, at 263.

131. See, e.g., DON M. WOLFE, *The Plastic Mind: Tocqueville and Horace Mann*, in *THE IMAGE OF MAN IN AMERICA* 44-66 (1970) (1957).

132. NISBET, *supra* note 55, at 191.

133. See, e.g., WILFRED E. BINKLEY, *AMERICAN POLITICAL PARTIES: THEIR NATURAL HISTORY* 17-18 (2d ed. 1947) (1943). Although Binkley himself did not express a fear of popular radicalism due to his confidence in the "political genius of our people" and the fact that the "Atlantic Ocean is presumed to have provided a salutary immunity," he identified Madison as having provided an answer to popular radicalism. *Id.*

political thought, by giving special presentist meaning to Madison's formulation. "In our own day, when so many have come to believe that faction justifies totalitarian methods," Fellman wrote, "Madison's acute analysis has a special relevance."¹³⁴ Indeed, the use of Madison to allay anxieties about totalitarianism became quite important in the postwar period.

Despite this Madisonian renaissance, Richard Matthews has recently advised us not to look to Madison for David Truman and Robert Dahl's pluralism: "If it is the pluralism of David Truman or Robert Dahl, who argued that out of the fierce competition among interest groups public policy (or the common good) is created, then Madison certainly cannot be considered a pluralist."¹³⁵ "Madison," he maintained, "never thought the common good developed out of these struggles; rather they canceled each other out, so that equilibrium resulted."¹³⁶ Similarly, Dahl, one of the purveyors of 1950s pluralism, hardly portrayed himself as a pure Madisonian. His book, *A Preface to Democratic Theory*, was essentially a dialogue with Madison, as much argument as celebration.¹³⁷ And here, Horwitz is quite right: Dahl's half-Madisonian postulates did not seem to be driven by deep political fear. Concern about the dictatorship of the many caused little more than a mild ache: "Like a nagging tooth, Madison's problem of majority tyranny has persistently troubled us throughout these essays."¹³⁸ Although Dahl referred to *The Authoritarian Personality* in his footnotes and made multiple references to tyranny, the tyranny is highly theoretical.¹³⁹ Dahl's general comfort is clear: "So long as the social perquisites of democracy are substantially intact in this country, it appears to be a relatively efficient system for reinforcing agreement, encouraging moderation, and maintaining social peace in a restless and immoderate people operating a gigantic, powerful, diversified, and incredibly complex society."¹⁴⁰ Somehow the restlessness and immoderation seem more rhetorical than real.

If there is a certain equipoise and confidence in Dahl's *A Preface to Democratic Theory*, others were more troubled. To that effect, Henry Kariel's *The Decline of American Pluralism* is the story of declension its title suggests. He may describe an America in which a

134. READINGS IN AMERICAN NATIONAL GOVERNMENT 9 (David Fellman ed., Rinehart & Co. 1949) (1947).

135. RICHARD K. MATTHEWS, IF MEN WERE ANGELS: JAMES MADISON AND THE HEARTLESS EMPIRE OF REASON 85 (1995).

136. *Id.*

137. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

138. *Id.* at 124.

139. *See id.* at 18 n.28.

140. *Id.* at 151.

“special genius would seem to have been at work, inspiring the development of an intricate, complex pluralistic system, a system developing at a leisurely pace, its growth unforced by rigid public laws or social blueprints,”¹⁴¹ but that comment was cast in the past tense. For this America, Kariel believed, had undergone the depersonalization and automation depicted by Schumpeter.¹⁴² Kariel explains: “Whereas the thrust of technology is toward integration, the thrust of American constitutionalism is toward disorganization, and hence ultimately toward stalemate. On the face of it, nothing would seem more likely than that these two seemingly opposed forces should meet in mortal combat.”¹⁴³ The result is that “American constitutionalism and an advanced technology, intimately linked, have encouraged a trend toward policy formation within a plurality of entrenched oligarchies.”¹⁴⁴ Kariel’s fears are obviously those of the top-down variety.¹⁴⁵ For him, the neo-Machiavellians “Michels, Mosca, and Pareto remain as right as ever.”¹⁴⁶ Clearly, oligarchy is everywhere.¹⁴⁷

D. Age of Anxiety

Ultimately, the core analysis of totalitarianism was a psychopathology that identified the roots of the pathology in social developments, often drawing from Joseph Schumpeter, so that the analysis was finally a socio-psychopathology. Hannah Arendt’s *The Origins of Totalitarianism* stands as the preeminent example. But this psychopathology ran quite broadly. Thus, for example, a section of the 1953 American Academy of Arts and Sciences conference on totalitarianism was devoted to the “Psychological Aspects of

141. HENRY S. KARIEL, *THE DECLINE OF AMERICAN PLURALISM* 10 (1961).

142. *See id.* at 19-20.

143. *Id.* at 25.

144. *Id.* at 68.

145. *See id.* at 87.

146. *Id.* at 241. He believes that because the government is “[s]creened off from scattered, unorganized, and unrepresented interests and thus free to ignore them, it discriminates against them. Established to protect the private rights of the individual, the government ends by contributing to their erosion.” *Id.* at 87. Here Kariel joins the postwar wave of interest in the “neo-Machiavellians.” During the war, James Burnham drew attention to them. *See* JAMES BURNHAM, *THE MACHIAVELLIANS: DEFENDERS OF FREEDOM* (1943). In 1958, James Meisel wrote his study of Mosca, *see* JAMES MEISEL, *THE MYTH OF THE RULING CLASS: GAETANO MOSCA AND THE “ELITE”* (1958), and H. Stuart Hughes devoted a chapter to “The Heirs of Machiavelli: Pareto, Mosca, and Michels” in H. STUART HUGHES, *CONSCIOUSNESS AND SOCIETY: THE REORIENTATION OF EUROPEAN SOCIAL THOUGHT, 1890-1930*, at 249 (1958).

147. Even the McGraw-Hill textbook on American government, in the context of the loss of individualism in mass society, states that “[a]nother development which is anti-individualistic and potentially dangerous to democracy is the growth of ‘pressure politics’.” CULLEN B. GOSNELLS ET AL., *FUNDAMENTALS OF AMERICAN NATIONAL GOVERNMENT* 454 (1955).

Totalitarianism.”¹⁴⁸ And Princeton political scientist William Ebenstein in his slim book *Today's Isms* adopted a standardized rehearsal of the “Psychological Roots of Totalitarianism.”¹⁴⁹ There Ebenstein turned, as others had before him, to the Frankfurt School team-written *The Authoritarian Personality* to make the psychological observation that “[t]he very existence of an authoritarian mass movement like fascism depends on the *desire* of many persons *to submit and obey*.”¹⁵⁰

It became standard to understand totalitarianism in psychological terms, drawing upon neo-Freudians in combination with psychologically oriented anthropologists so that its force was seen as driven by social fear and anxiety. Without doubt, references to totalitarianism occasionally came across as little more than obligatory gestures. Indeed, Irving Howe charged in his oft-cited essay *This Age of Conformity* that the danger of Stalinism, while significant, had been used by many liberal intellectuals as a convenient excuse to “become partisans of bourgeois society.”¹⁵¹ Nevertheless, anxieties associated with totalitarianism—or with the particular social or political forces that were viewed as way stations to totalitarianism—were often quite substantial and, as I have been arguing, palpable in much of the political and social science writing of the postwar period.

It is difficult to read Richard Hofstadter's urgent prose without seeing the hint of anxiety in the student of an “age of anxiety,” and there were too many refugees from Hitler's Germany in American intellectual life for the fear of totalitarianism to be taken lightly.¹⁵² Anxieties about totalitarianism expressed fear of a threat from one of two directions—a fear of popular passion and a fear of encroaching oligarchy—and both of these threats could be viewed as coming from either the left or the right. Thus, anxieties about totalitarianism came in a variety of different forms. Anxiety might have been driven more by the horrors of Hitler's Germany or Stalin's Soviet Union—or it might have found more immediacy in the domestic experience of McCarthyism. Yet despite these variations, a strong current brought these streams together—the strength of the fear of totalitarianism and psychological concerns about modern society that so mark postwar American political and social thought.

148. See TOTALITARIANISM, *supra* note 11, at 139-230.

149. WILLIAM EBENSTEIN, *TODAY'S ISMS* (1958).

150. *Id.* at 91.

151. Irving Howe, *This Age of Conformity*, 21 *PARTISAN REV.* 7, 15 (1954).

152. McClay sees the émigré influence as dominant in his discussion of the analysis of totalitarianism. See MCCLAY, *supra* note 102, at 189-225.

III. LEGAL THOUGHT'S INDECENT COMPOSURE

If totalitarianism was so often a significant presence—a suggestion of imminent danger—in postwar social and political thought, what then of postwar legal thought? As we traverse the core subjects of postwar legal discourse—the incorporation of the Bill of Rights, the role of the courts and judicial review, civil rights and desegregation, the function of the legal process—we should ask whether we find the same totalitarian anxiety that was so central to political and social science. Morton Horwitz identifies “the varying interpretations of and reactions to the horrors of fascism, Nazism, and Stalinism” as representing one of three broad influences on postwar legal thought.¹⁵³ According to Horwitz, “[t]he single dominant theme in postwar American academic legal thought is the effort to find a ‘morality of process’ independent of results.”¹⁵⁴ And he sees the emphasis on legal process as continuous with the process focus of Robert Dahl’s pluralism, which Horwitz in turn perceives as part of a general move away from politics and away from the focus on “form instead of substance” in postwar academic thought as a whole.¹⁵⁵ I have already suggested that despite the complacent mood of Dahl, the urgency of postwar social and political thought was unmistakable and the force of politics real. The scholars who participated in the American Academy of Arts and Sciences conference on totalitarianism were clearly not “repressing” politics. But can we say the same for legal thinkers?

A. *Totalitarian Lessons for Civil Liberties Jurisprudence*

The Supreme Court could hardly have ignored the threat of totalitarianism. As Melvin Urofsky has reminded us, “Cold War issues dominated much of the Vinson Court’s docket.”¹⁵⁶ Thus, for example, the Supreme Court was compelled to address the threat of communism when it upheld the Smith Act of 1940 in the *Dennis* case¹⁵⁷ in 1951. In *Dennis*, the Court worked through the clear-and-present-danger test in light of the threat represented by the American Communist Party. In his opinion in *Dennis*, Chief Justice

153. HORWITZ, *supra* note 15, at 247.

154. *Id.* at 253.

155. *Id.* As an example, Horwitz points to the New Criticism, but we have to remember that the New Criticism shared the literary critical stage with a number of other methodologies, such as the myth and symbol school with its move towards contextualization. And, for example, the postwar period also witnessed a move within art history towards contextualization in the ascendance of iconology.

156. MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-1953*, at 159 (1997).

157. *Dennis v. United States*, 341 U.S. 494 (1951).

Vinson describes “a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders . . . felt the time had come for action.”¹⁵⁸ Justice Jackson, in his concurring opinion, goes further in describing the totalitarian threat. He explains that “[t]otalitarian groups here and abroad perfected the technique of creating paramilitary organizations to coerce both the public government and its citizens.”¹⁵⁹ Indeed, Jackson felt that “[u]nless we are to hold our Government captive in a judge-made verbal trap, we must approach the problem of a well-organized, nation-wide conspiracy . . . as realistically as our predecessors faced the trivialities that were being prosecuted until they were checked with a rule of reason.”¹⁶⁰ There is no doubt that Jackson’s words were full of foreboding. As Urofsky has suggested, Jackson, recently returned from his duties as American prosecutor at the Nuremberg trials, “looked on potential dictatorial groups with far less tolerance than he had displayed in some of his wartime opinions.”¹⁶¹

In his dissent in *Dennis*, Justice William O. Douglas made clear comparisons to the Soviet regime: “The opinion of the Court does not outlaw these texts nor condemn them to the fire, as the Communists do literature offensive to their creed.”¹⁶² But, it seemed, the Court did the next best thing by condemning their teaching. And Douglas would go on to quote Vishinsky’s *Law of the Soviet State*: “In our state, naturally, there is and can be no place for freedom of speech, press, and so on for the foes of socialism.”¹⁶³ Douglas declared, “Our concern should be that we accept no such standard for the United States.”¹⁶⁴ The *Dennis* case was fraught with totalitarian fears on all sides. We have learned that Justice Felix Frankfurter wrote Jackson an imploring note: “Could [you] not say what you think you ought to say in *Dennis* without giving unavoidable reinforcement to the McCarthy’s, the McCormick’s and the other exploiters of the irrational in the land.”¹⁶⁵ In *Dennis* and the other cases on the Cold War docket described by Urofsky, the Supreme Court was deeply engaged in the same concerns about

158. *Id.* at 510.

159. *Id.* at 577 (Jackson, J., concurring).

160. *Id.* at 568-69 (Jackson, J., concurring).

161. UROFSKY, *supra* note 156, at 172.

162. *Dennis*, 341 U.S. at 583 (Douglas, J., dissenting).

163. *Id.* at 591 (Douglas, J., dissenting) (quoting ANDREY VISHINSKY, *LAW OF THE SOVIET STATE* (Hugh W. Babb trans., Macmillan 1948) (1938)).

164. *Id.* Urofsky cites Douglas’s reference to Vishinsky and this poignant line. *See* UROFSKY, *supra* note 156, at 175.

165. Note from Justice Felix Frankfurter to Justice Robert Jackson (Mar. 20, 1953), *cited in* HOWARD BALL & PHILLIP J. COOPER, *OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA’S CONSTITUTIONAL REVOLUTION* 145-46 (1992).

totalitarianism that I have described in the context of postwar social and political thought, except that the Court had to make real decisions impacting the health of the Republic. Richard Parker has identified the invocation of fear at the heart of constitutional argument,¹⁶⁶ and clearly totalitarian anxieties fill the rhetoric of the Court.

Jackson, who had acted as the American prosecutor in the Nuremberg trials,¹⁶⁷ was perhaps the Justice on the Vinson Court who expressed the deepest fear of totalitarianism. In fact, his Godkin lectures, which were never given but published posthumously in 1955 as *The Supreme Court in the American System of Government*,¹⁶⁸ start by invoking “these convulsive times” and very quickly move into a confrontation with totalitarianism. In fact, the second sentence of Jackson’s book announces his “reexamination of the premises of American constitutional democracy, which now is confronted with an armed doctrine claiming to be a newer and higher form of democracy.”¹⁶⁹ It takes a while for him to name communism specifically. Instead, he refers to a “newer and higher form of democracy” on the first page and the “‘newer’ democracy” on the next¹⁷⁰ as if it might be mildly embarrassing to be specific because his subject occupied a position so stage-front in Cold War America. And in that we-all-know-what-I-am-talking-about mode, he describes how communism denies the “independence and neutrality” of an independent judiciary and administers a system of law that “tolerates no judicial checks against dictatorship.”¹⁷¹

Jackson draws from *Dennis* to describe how communism is able to use American civil libertarian culture to its own advantage: “I find little indication that [the forefathers] foresaw a technique by which those liberties might be used to destroy themselves by immunizing a movement of a minority to impose upon the country an incompatible scheme of values which did not include political and civil liberties.”¹⁷² For Jackson, the threat is real because the totalitarians are so convincing: “Communism, Nazism, and Fascism have each made

166. See Richard Parker, *Constitutional “Voices,”* in PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON “THE EVOLVING U.S. CONSTITUTION: 1787-1987,” at 95, 116-25 (1989).

167. For Primus, the “themes of Nuremberg became prominent in American jurisprudence” in part due to the impact of American jurists who participated in the trial, including Herbert Wechsler, Francis Biddle, and Robert Jackson. See Primus, *supra* note 25, at 430.

168. ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 1 (1955).

169. *Id.* at 1.

170. *Id.* at 1-2.

171. *Id.*

172. *Id.* at 4.

phenomenally successful drives to capture the minds and loyalties of numerous and aspiring peoples for this philosophy so antithetic to our own.”¹⁷³ Striking a chord that would have resonated with broader cultural messages outside of legal writing, Jackson declared that “we are in an age of rebellion against liberty.”¹⁷⁴ In fact, the editors of Jackson’s posthumous lectures point out here that Jackson had written Camus’s name in the margin alongside this note.¹⁷⁵ Jackson brought this diagnosis home and talked about American dangers—“all of the American trends which, rightly or wrongly, have cooled the zeal of our own people for the principles on which our government was founded.”¹⁷⁶ Obviously, Jackson perceived a clear and present danger.

Similar thoughts about the threat of totalitarianism filled the publications that debated the Court’s Cold War docket.¹⁷⁷ As Michael Belknap describes in his *Cold War Political Justice*, the trial court for the *Dennis* case was barraged by picket lines.¹⁷⁸ Clearly, the federal courts could not escape the political energy that infused First Amendment questions. Similarly, academic discussion of the freedom of speech could also hardly ignore the dangers posed by the repression of that speech. Thus, for example, in his review of Alexander Meiklejohn’s *Free Speech*, Zechariah Chafee worried about popular energies when he observed that the “country seems to be suffering again from an epidemic of hysteria such as it underwent during the ‘Red Menace’ of 1919-1920.”¹⁷⁹ And Nathaniel Nathanson, writing on the *Dennis* case in the *Harvard Law Review*, worried about the force of conformity: “At times when social, business, and political pressures all put a premium upon conformity, the right of private, confidential discussion may be even more important to the right of dissent than public discussion.”¹⁸⁰ Moreover, he warned that

173. *Id.*

174. *Id.* at 7.

175. *See id.* at 87 n.6.

176. *Id.* at 4.

177. *See, e.g.,* Louis B. Boudin, “Seditious Doctrines” and the “Clear and Present Danger” Rule, 38 VA. L. REV. 143, 315 (1952); Nathan Nathanson, *The Communist Trial and the Clear-and-Present-Danger Test*, 63 HARV. L. REV. 1167 (1950), reprinted in *ESSAYS IN CONSTITUTIONAL LAW* 300 (Robert G. McCloskey ed. 1962); Elliot Richardson, *Freedom of Expression and the Function of the Courts*, 65 HARV. L. REV. 1 (1951).

178. *See* MICHAEL R. BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES* 77 (1977). Belknap describes in detail the demonstrations and political moves made during the trial. *See, e.g., id.* (describing a demonstration by the Civil Rights Congress in his chapter on the “Battle of Foley Square”).

179. Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891 (1949) (reviewing ALEXANDER MEIKLEJOHN, *FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT* (1948)), reprinted in *ESSAYS IN CONSTITUTIONAL LAW*, *supra* note 177, at 281, 282.

180. Nathanson, *supra* note 177, at 1171.

the law might be “invoked against unpopular minorities.”¹⁸¹

If totalitarian worries were unavoidably central to First Amendment jurisprudence, so too were they an inescapable part of Fifth Amendment jurisprudence. Erwin Griswold’s slim volume on the Fifth Amendment published in 1955 makes a direct attack on the McCarthy era legislative committee hearings and argues for broad use of the Fifth Amendment. Griswold wants us all to know that the hearings were ultimately politically driven events when he asks: “Let us mix in a large measure of television, newsreels, radio, after-session press releases, and so on. In this atmosphere, why is it not obvious that disinterestedness retreats to the background, and that this is true with respect to many controversial legislative investigations?”¹⁸² Making the totalitarian turn explicit, Griswold uses the dangers of Stalinism as an argument against McCarthyism: “We will gain nothing in this country if we adopt the methods of the communists to protect ourselves against communists.”¹⁸³ And then to emphasize this irony he quotes from Kulski’s *The Soviet Regime* on the totalitarian mind:

The totalitarian mind accepts all the means which promise the achievement of its ends. A political democrat is ready to compromise some of his ideal ends for the sake of renouncing means which would involve the sacrifice of human lives or freedom. This is the major moral issue dividing any totalitarian, be he Communist or Fascist, from a genuine democrat.¹⁸⁴

Here Griswold turns George Kennan’s analysis of Soviet obsessiveness about security on its head, suggesting that we too have been misguided by “The Illusion of Security.”¹⁸⁵ In the specific context of the Fifth Amendment, Griswold asserts that, although we tend to think in “historical terms” about the Fifth Amendment privilege, we need instead to think about the power of the modern state and to confront “the standard operating procedures of the police states which have brought the medieval techniques up to date.”¹⁸⁶ Over the course of his book, the dean of Harvard Law School pulled out all the stops and constructed an image of the legislative investigation as a symptom of a police state that created peril for the individual.

181. *Id.* at 1175 n.19.

182. ERWIN N. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 64 (1955).

183. *Id.* at 70.

184. *Id.* (quoting WLADYSŁAW WSZEBOR KULSKI, *THE SOVIET REGIME: COMMUNISM IN PRACTICE* (1954)).

185. *Id.* at 72 (quoting the title of a speech by George F. Kennan). Kennan was himself quite cognizant of the domestic threat.

186. *Id.* at 75.

It may have been rather natural for both First and Fifth Amendment jurisprudence to provide a platform for anxious thoughts about totalitarianism. The question that remains, however, is whether those same or similar anxious thoughts invaded the broader jurisprudential arguments of the postwar period. Here, I am not thinking about the occasional forays onto more general intellectual terrain, such as Harold Berman's essay on *The Devil and Soviet Russia* published in *The American Scholar* in 1958.¹⁸⁷ Rather, I am thinking of the central jurisprudential developments of postwar legal thought, especially the ongoing debate on judicial review and the role of the courts, as well as the emphasis on the legal process.

B. The Marshall Bicentennial Conference and "Government Under Law"

For this analysis, we can find a particularly interesting artifact in the proceedings of the bicentennial celebration of John Marshall's birth, held at Harvard Law School in September 1955 and published under the title *Government Under Law*.¹⁸⁸ The conference was a sort of gathering of the clan—if rather Harvard-centric—of the legal establishment. Emblematic is the frontispiece for the published proceedings labeled "a galaxy of justices," which pictures Erwin Griswold, Felix Frankfurter, and Earl Warren sitting around a table with the Chief Justices of Canada, South Africa, and Australia and the Master of the Rolls of England—the list, I think, says a great deal. And as one flips through the volume, there are plenty of photographs of McGeorge Bundy with his trademark clear plastic frames, Earl Warren smirking in a picture with James Casner, Henry M. Hart with his eyebrows raised, Louis Hartz gripping the lectern, Thurgood Marshall with his thin mustache, Father Joseph Snee in his clerical collar in front of a WBGH microphone, Herbert Wechsler with a copy of Father Snee's paper in front of him, and so forth. The photographs suggest three days of serious, important discussion, and one might imagine a good deal of pious homily; what else would one expect for a self-consciously monumental conference on "Government Under Law" in 1955? But, of course, the words "government under law" in 1955 pointed to their opposite, government unencumbered by law, the totalitarian state, and in this perfect mid-1950s platform for addressing totalitarianism I would like to ask just how central totalitarian anxieties were to the

187. Harold J. Berman, *The Devil and Soviet Russia*, 27 AM. SCHOLAR 147 (1958).

188. GOVERNMENT UNDER LAW: A CONFERENCE HELD AT HARVARD LAW SCHOOL ON THE OCCASION OF THE BICENTENNIAL OF JOHN MARSHALL, CHIEF JUSTICE OF THE UNITED STATES, 1801-1835 (Arthur E. Sutherland ed., 1956).

proceedings.¹⁸⁹

The first address of the conference was delivered by Felix Frankfurter on "John Marshall and the Judicial Function." Frankfurter turned mid-lecture to his main theme, the judicial function, but in the transition he described his role in the conference as "that of the Greek chorus."¹⁹⁰ Here he quoted Haigh's *The Attic Theatre* to the effect that the role of the chorus at the height of development of Greek theater was to be "removed from the stress and turmoil of the action into a calmer and more remote region, though it still preserves its interest in the events upon the stage."¹⁹¹ "This," Frankfurter continued, "clearly is my cue, rather than the later still more receding role of the chorus, whereby it 'begins to lose even its interest in the action' and 'sings odes of a mythological character, which have only the remotest connexion with the incidents of the plot'."¹⁹² It is difficult to read this characterization of his role in the conference without detecting in it a figure for his role as a judge, like his suggestion in the next paragraph of his intention not to stray "outside [his] confining judicial curtilage."¹⁹³ Frankfurter was indeed moving to use the forum as an opportunity to give voice to his philosophy of judicial restraint.¹⁹⁴

Frankfurter understood well that "judicial review is a deliberate check upon democracy through an organ of government not subject to popular control."¹⁹⁵ But for him, the real bedrock of democracy was not the court's review function but rather the habits of the society in which the court sat: "What matters most is whether the standards of reason and fair dealing are bred in the bones of people. Hyde Park represents a devotion to free speech far more dependable in its assurances, though unprotected by formal constitutional requirement, than reliance upon the litigious process for its enjoyment."¹⁹⁶ Frankfurter confidently described the function of law

189. David Hollinger provides an excellent model for the analysis of an academic conference in his chapter "Two NYUs and 'The Obligation of Universities to the Social Order' in the Great Depression," in DAVID A. HOLLINGER, *SCIENCE, JEWS, AND SECULAR CULTURE: STUDIES IN MID-TWENTIETH CENTURY AMERICAN INTELLECTUAL HISTORY* 60-96 (1996).

190. Felix Frankfurter, *John Marshall and the Judicial Function*, in *GOVERNMENT UNDER LAW*, *supra* note 188, at 6, 14.

191. *Id.* at 15 (citing A.E. HAIGH, *THE ATTIC THEATRE* 320-21 (Oxford, The Clarendon Press, 2d ed. 1898)).

192. *Id.*

193. *Id.*

194. Frankfurter began his move to judicial restraint by referring to himself as "[o]ne brought up in the traditions of James Bradley Thayer [who was a keystone for both Frankfurter's and Hand's judicial restraint], echoes of whom were still resounding in this very building in [his] student days." *Id.*

195. *Id.* at 19.

196. *Id.* at 28.

as “an enveloping and permeating habituation of behavior, reflecting the counsels of reason on the part of those entrusted with power in reconciling the pressures of conflicting interests.”¹⁹⁷ Frankfurter described judging as difficult, especially the exercise of judicial review. It was, indeed, a difficult task for a judge to enter into an arena of political passions: “Only for those who have not the responsibility of decision can it be easy to decide the grave and complex problems [political passions] raise, especially in controversies that excite public interest.”¹⁹⁸

It is significant that Frankfurter’s discussion of judicial restraint adopts the sort of language others reserve for totalitarianism and applies it to the hazards of misguided judicial review. He talks about the “drastic” veto power, “this danger,” and a “dangerous sham.”¹⁹⁹ And in his final paragraph, he warns that courts exercising their technical jurisdiction are able to “release contagious consequences.”²⁰⁰ In Frankfurter’s talk, it turns out that the courts, not the mob or the authoritarian state, bring danger and contagion. Nevertheless, it was clear that Frankfurter and his fellow judges had an important charge in the liberal state:

[S]ince the grounds of decisions and their general direction suffuse the public mind and the operations of government, judges cannot free themselves from the responsibility of the inevitable effect of their opinions in constricting or promoting the force of law throughout government. Upon no functionaries is there a greater duty to promote law.²⁰¹

Frankfurter was, of course, still caught up in the old progressive critique of the *Lochner*-era courts. His central admonition did not focus on the evils of totalitarianism, either the threat of uncontrolled centralized power or the threat of uncontrollable popular passions. Rather, Frankfurter addressed the audience gathered in Austin Hall on the dangers posed by the courts; for him, the judiciary was hardly the least dangerous branch. The perils of totalitarianism were, of course, not lost on him. He spoke in the familiar rhetoric of crisis, whether “excite[d] public interest” or “contagious consequences.” And if there were no imaginable peril, he would not have needed to assure his audience about the “deeply grounded rule of law” in the people.²⁰² Ultimately, however, Frankfurter was not speaking the same language as the social scientists distressed about the totalitarian

197. *Id.*

198. *Id.* at 20.

199. *Id.* at 20-21.

200. *Id.* at 31.

201. *Id.*

202. *Id.* at 28.

state. Rather, he was deeply engaged in a self-reflexive critique of the American judiciary. And if the most visible danger came from the overactive judge, it becomes clear that Frankfurter had not really appeared in the role of a Greek chorus, for he was in the midst of the main action. As I will suggest, there were a number of speakers at the Marshall bicentennial for whom totalitarianism was an important reference point. Nevertheless, Frankfurter's opening address is just the first sign of the separate track that postwar legal discourse took, of its distance from the anxieties expressed in political and social science writing.

If one works through the various papers of the conference as well as the transcripts of the discussion that ensued after each talk, one finds a variety of references to totalitarianism generically, and specifically to the Nazi and Soviet regimes. One can also find numerous suggestions of "danger," such as John Lord O'Brien's warning of the "grave danger . . . presented by the larger aspects of the so-called programs to ensure loyalty and security" that can subject an American to "inquisitions relating not only to his acts but his private convictions, his aspirations and his attitude toward government."²⁰³ The Cassandra tones of Walter Lippmann's just-published *The Public Philosophy* appear in several talks, and Paul Freund ended his comments with a "solemn" note from Reinhold Niebuhr's *The Children of Light and the Children of Darkness*.²⁰⁴

Fundamentally, the Marshall bicentennial conference provided a forum for cautionary pronouncements on overly powerful government on the one hand and an overwrought public on the other. The organizers of the conference had established four basic themes that could only encourage discussions of the place of totalitarianism: "Government as Protector of the People against the Government," "Government under Law in Time of Crisis," "The Meaning of Due Process," and "The Value of Constitutionalism Today."²⁰⁵ Yet, even though these topics would easily admit

203. John Lord O'Brien, *The Value of Constitutionalism Today*, in GOVERNMENT UNDER LAW, *supra* note 188, at 507, 518.

204. Paul Freund, Comment, in GOVERNMENT UNDER LAW, *supra* note 188, at 355, 358-59 (quoting REINHOLD NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* (1944)). One even finds a foreign speaker like André Tunc forced to proclaim defensively that the French government also had appropriate protections against governmental abuse. "A comparison between American and French practices may even lead to the conclusion that the French courts, while they refuse to review legislation and while they have rarely to render such a spectacular decision as the *Steel Seizure Case*, exercise on executive and administrative action at least as severe a control as the American courts." André Tunc, *Government Under Law: A Civilian View*, in GOVERNMENT UNDER LAW, *supra* note 188, at 35, 50.

205. See Erwin N. Griswold, *Foreword* to GOVERNMENT UNDER LAW, *supra* note 188, at v, vi.

atmospheric anxieties about totalitarianism, the conference based on Marshall's contribution to constitutionalism was unambiguously a conference about judicial review. The question, then, is whether the conference as it played out focused on the role of the judiciary as a bulwark against totalitarian threats. Or rather, did it become so embroiled in a judiciary-centric discourse that the threat of totalitarianism, even when explicit, was not really at the heart of the discussion? For this examination, I would like to begin with the talk given by Father Joseph Snee of Georgetown and the comments that followed by Herbert Wechsler and Henry M. Hart, before turning to Charles Wyzanski's talk on *Constitutionalism: Limitation and Affirmation*.

The first page of Joseph Snee's *Leviathan at the Bar of Justice* is filled with a series of dangers. "We Americans," he tells his audience, "have long been accustomed to take for granted the merits of democracy and personal liberty and to regard the theory of limitations upon government as a matter for academic discussion."²⁰⁶ The "take for granted" telegraphs the warning that arrives in the following sentence: "Two world wars and the recrudescence of totalitarian governments in our own 'enlightened' age have startled that complacency."²⁰⁷ We are, it seems, still on the note of popular perception when he says that it is now "a commonplace to say that we live in an era of crisis," and he talks of the "danger, real or apparent, of internal subversion."²⁰⁸ But mid-sentence Snee commits himself, for that danger "presents a particularly strong temptation to bypass the orderly procedure of law and to adopt the processes of force which seem so much more quick and effective."²⁰⁹ Here he perceives a move to the "principle that the end justifies the means," which, he states just before turning to Walter Lippmann, "is as fatal to a life of democratic freedom as it is to sound morality."²¹⁰

We should not be surprised to see the turn to morality from a Georgetown Jesuit, and as expected, we see him on the very next page begin to invoke natural law.²¹¹ An avowed Thomist, Snee expresses the Catholic natural law response to the legal relativism that Edward Purcell describes in *The Crisis of Democratic Theory*.²¹² But Snee does not seem to dwell very long on natural law. Instead,

206. Joseph M. Snee, *Leviathan at the Bar of Justice*, in GOVERNMENT UNDER LAW, *supra* note 188, at 91, 91.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *See id.* at 92.

212. *See* PURCELL, *supra* note 9, at 164-72.

he transforms his natural law viewpoint by positing a dichotomy between “power” and “authority.” And in describing power and its limits, he makes the transition from Maritain to the political thinkers McIlwain, Corwin, Madison, and Jefferson.²¹³ “The story of political theory,” he tells us, “is that of a quest for effective means of limiting the exercise of governmental power and for philosophical justifications of such limitation.”²¹⁴ He continues in this vein by observing that “the problem of justification becomes particularly acute in a democratic society, where representative government is responsive to the will of the people.”²¹⁵ Snee returns several times to Lippmann’s *The Public Philosophy*, even ending his address on Lippmann’s advice that “[n]o more than the kings before them should the people be hedged with divinity.”²¹⁶ In the end, Snee turns to the Court for protection from a wayward majority. “Despite its inherent conservatism, perhaps because of it,” Snee asserts, “I believe that the Court in placing a temporary check upon the legal effectuation of the popular will, particularly in the area of human rights, fulfills and was meant to fulfill an essential function in a free and democratic society.”²¹⁷ But for Snee the authority of the Court itself depends upon the commitment of the populace to constitutional limits. To this effect he asserts that “[u]nless the members of the body politic are convinced of the permanent, long-term value of the constitutional guarantees of liberty and of the supremacy of law and reason over will, there is no power on earth which will serve to preserve these freedoms and the American tradition.”²¹⁸

Snee’s nightmare is Lippmann’s—government’s power to coerce in the hands of an unchecked majority that has lost touch with the “public philosophy.” The present check against that majority is not so much provided by the Constitution or the Court as by popular devotion to the “ideal of freedom.”²¹⁹ Snee has introduced a strange circularity—the only defense against destructive popular energies is embedded in the people themselves. But that very circularity also suggests our vulnerability. For if, as his quotation from Lippmann indicates, the people are losing their grounding in public

213. He does circle back explicitly to “natural” law when he explains: “Over and above the positive rights guaranteed in the Constitution, there exist natural rights there enshrined.” Snee, *supra* note 206, at 129. But mostly he lets Frankfurter’s “canons of decency and fairness” stand in for natural law. *Id.* at 115.

214. *Id.* at 105.

215. *Id.*

216. *Id.* at 130 (quoting LIPPMANN, *supra* note 106, at 14).

217. *Id.* at 126.

218. *Id.* at 129.

219. *Id.*

commitment, then the threat emerges from an authoritarian government at the direction of a repressive majority. This was not a hypothetical concern, for as Snee mentions in his informal comments: “[I]t is in times of crisis, such as we are experiencing now, that there comes a temptation to do away with [the] slow processes of truly democratic and liberal government. It’s then more than ever that we need protection against a majority.”²²⁰

Herbert Wechsler’s short comment on Snee’s paper stands as a rehearsal for his famous article of 1959, *Toward Neutral Principles of Constitutional Law*.²²¹ Wechsler begins by neutralizing Father Snee’s Thomism. He does this by asserting that “[a] constitution, we might say, would be ill suited for a varied people, nursing philosophic among other factions, if it could not draw support from almost any system of ideas by which a decent man may think that he explains the moral universe and lives.”²²² Then he turns rather quickly to focus on the “mechanisms by which government may be employed as a protector of the people against the government,”²²³ which of course meant the courts. For Wechsler, the role of the courts was rather modest, basically performing the function of “an instrument of sober second thought by the political branches.”²²⁴ After describing the “neutrality and generality of formulation” by the courts²²⁵—prefiguring his 1959 essay—he explains again the courts’ role in bringing attention to the rights of individuals and minorities.²²⁶ Wechsler is quite frank about the courts’ slim role: “In thinking of the possibilities of using government as a protector of the people against government, meaning in practice using one organ of power or authority to check alleged abuses by another, the Constitution provides no more than minimal solutions; the real challenge is one to legislation.”²²⁷ Wechsler may speak of a “challenge” and of the “reasonable claims of individuals and minorities,” but there does not seem to be much of a threat looming over his world; at most, there is a need for a “sober second thought.” Behind Wechsler’s push towards neutrality is his obvious agitation about the excessively

220. *Id.* at 130, 133.

221. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

222. Herbert Wechsler, Comment, in *GOVERNMENT UNDER LAW*, *supra* note 188, at 134, 135.

223. *Id.* at 136.

224. *Id.* at 137.

225. *Id.* at 138.

226. Here he states that “the judicial function largely serves to further fair attention in the legislative process to the reasonable claims of individuals and minorities asserting fundamental rights.” *Id.*

227. *Id.* at 139.

political performances of the Supreme Court.²²⁸ But what is interesting about Wechsler's neutrality is that it represents an attempt to de-politicize the judiciary while showing no anxiety about the politics of the other branches of government. We are, it seems, in a world in which the main protection needed was a "sober second thought."

In his own comment on Snee's paper, Henry Melvin Hart, Jr., begins with the old Learned Hand chestnut: "A society so riven that the spirit of moderation is gone, no court *can* save . . . a society where that spirit flourishes no court *need* save." Hart suggests that he "cannot help believing that Judge Hand, when he wrote that, had his attention on the turning of a phrase."²²⁹ The problem with Hand's formula, in Hart's mind, is that its search for elegant polarity loses sight of the center, exemplifying the "fallacy of the undistributed middle."²³⁰ Societies, Hart explains, are not easily divided into the two extreme camps.²³¹ Clearly, for Hart, the formula does not fit the United States well: "In particular, it isn't what American society is like. A society is something in process—in process of becoming. It has always within it, as ours does, seeds of dissension. And it also has within it forces making for moderation and mutual accommodation."²³² At this point, Hart turns to the role of the courts and whether they are charged with moderating society.²³³ The more important turn in Hart's paper is not his flattening out of Hand's rhetoric, but rather his response to Snee's search for "effective means for limiting the exercise of governmental power and for philosophical justifications for such limitation."²³⁴ Hart responds by moving away from a preoccupation with governmental abuse: "The political problem is *not* simply negative. It is a delusion to suppose, as so many people have, that if only you can prevent the *abuse* of governmental power everything else will be all right."²³⁵

Rejecting excessive concern with government intrusion, Hart tells us that "[t]he political problem is a problem also of eliciting from government officials, and from the members of the society generally, the affirmative, creative performances upon which the well-being of

228. See KALMAN, *supra* note 23, at 41.

229. Henry M. Hart, Jr., Comment, in *GOVERNMENT UNDER LAW*, *supra* note 188, at 139, 140 (quoting Learned Hand). On Hand's stylistic extravagances, see Landauer, *supra* note 6, at 231, 254-55.

230. Hart, *supra* note 229, at 140.

231. In Hart's words, "that isn't what societies are like." *Id.*

232. *Id.* at 140-41.

233. "The question—the relevant question—is whether the courts have a significant contribution to make in pushing American society in the direction of moderation." *Id.* at 141.

234. *Id.*

235. *Id.* (emphasis in original).

society depends.”²³⁶ From his perspective, all of the constitutional protections considered over the course of the conference—whether judicial review, the guarantees of the Bill of Rights or the separation of powers—were “presented as devices, essentially, for avoiding the abuse of official power rather than as instruments also for eliciting to the full the creative potentialities both of citizens generally and of those citizens who become officials.”²³⁷

For Hart, this is every bit as much description as prescription, and in his one reference to totalitarianism, he states that “[p]robably a majority of Americans thought of World War II as a struggle between the dread efficiency of totalitarianism and the pleasant wastefulness of a democratic life”; he responds that “it isn’t true that our system is inefficient.”²³⁸ Ultimately, government in America is about creating the “conditions which will release to the uttermost the enormous resources of private ordering of social affairs, of private adjustment of social difficulties, of private creativity.”²³⁹ Hart is thus ushering us into the America of Willard Hurst’s “release of creative human energy.”²⁴⁰ That is law’s function and purpose. There seem to be few anxious moments—even Hart’s advocacy of “release” is not paired with worries about “restriction.” Concerns about totalitarianism or any of the social ills for which totalitarianism provided a figure are significantly absent.

Charles Wyzanski, then Judge of the U.S. District Court for the District of Massachusetts and a former clerk for both Learned and Augustus Noble Hand, spends almost half of his paper establishing a dichotomy between the naïve lay view and the sophisticated legal theorist’s view of constitutionalism. “To the layman,” he writes, “constitutionalism never stood in higher esteem than now. The cruelties of Nazi and Soviet totalitarian regimes have . . . focused popular concern upon the need of some avowed limitations upon political authority.”²⁴¹ By contrast to these lay imaginings informed by totalitarian nightmare, Wyzanski depicts the academic’s worldly skepticism. For the academic, he recites all of the complications of modern society: “Whatever country may be our residence, we live in a mass democracy founded on a refined technology and administered by a managerial class controlling vast organizations.”²⁴² Along with

236. *Id.*

237. *Id.* at 142.

238. *Id.* at 143.

239. *Id.* at 144.

240. HURST, *supra* note 64, at 5.

241. Charles E. Wyzanski, Jr., *Constitutionalism: Limitation and Affirmation*, in GOVERNMENT UNDER LAW, *supra* note 188, at 473, 473.

242. *Id.* at 476.

references to “mass media” and to Joseph Schumpeter—touchstones of contemporary social and political thought—Wyzanski says that “[u]nder the view just stated constitutionalism sinks into a minor role in political theory.”²⁴³ In this modern society, then, constitutionalism has lost its privileged status. From there Wyzanski turns to what he describes as a “kindred deprecatory view of conventional laudation,”²⁴⁴ a view that denies the innate corrosive nature of power. He uses this in turn to introduce its specifically American rendition, a skepticism towards constitutionalism and judicial review espoused by Learned Hand. Here, like others, he pulls out the familiar Hand line that proclaimed that a society where the spirit of moderation “flourishes no court *need* save.”²⁴⁵

When Wyzanski first establishes the lay/professional dichotomy, he seems to be drawing caricatures to be used essentially as foils, and he readily admits as much.²⁴⁶ But only a few pages later, referring to “we professionals,”²⁴⁷ Wyzanski forces us to abandon the assumption that he has created a false dichotomy in order to be able to occupy the solid center. There his professionalism was sociological: What “we professionals” seem to know is that “[a]ll liberties are the result of social process”²⁴⁸ and therefore are not absolute. Wyzanski uses this explicitly sociological turn to suggest his alliance with Hand and to observe that “the doctrines of constitutionalism constitute not law but the sort of myth which has as its chief worth the encouragement of a continuity of customary habits and a spirit of moderation.”²⁴⁹ But just at that point, Wyzanski seems to reverse himself from the earlier skepticism. “Before we jump to embrace this self-deprecatory skeptical seer,” he states, “let us ask ourselves why it is that no constitutional state seems ever to have existed without independent courts”²⁵⁰ His talk even builds to a sentence about the “courts being teachers to the citizenry.”²⁵¹

At this point in his seeming oscillation, Wyzanski distances himself from both of what he describes as the lay and professional viewpoints. He does this by criticizing the “oft-repeated contention that both in popular estimation and in legal character the chief role of constitutionalism is negative—a system for the division, limitation,

243. *Id.* at 477.

244. *Id.*

245. *Id.* at 479 (quoting Learned Hand) (emphasis in original).

246. “The foregoing contrast between the attitudes of the applauding unsophisticated layman and the critical informed professional is admittedly exaggerated.” *Id.*

247. *Id.* at 484.

248. *Id.*

249. *Id.* at 485.

250. *Id.*

251. *Id.* at 486.

and restraint of power to prevent its abuse.”²⁵² This is the import of the title of Wyzanski’s talk, *Constitutionalism: Limitation and Affirmation*. Wyzanski is able to announce his own view of constitutionalism as “the institutionalization of the principle that the state’s goal is the increase in opportunities for the development of the individual as the seat of ultimate spiritual, political, and creative authority.”²⁵³ Here he takes Hart’s line. He urges his audience to transcend the notion of constitutional liberty as “being always a problem of freedom from state intervention and never a problem of freedom through state action.”²⁵⁴ Wyzanski’s final turn, then, is hardly the jaded skepticism of the professional. Indeed, he professes “faith,” which he tells us “has virtue in politics and in law as in religion.”²⁵⁵ As I have suggested, the rhetoric of Wyzanski’s paper repeatedly shifts in its relation to the poles of popular faith in constitutionalism and sociological skepticism, so that he can finally come upon a sociologically sophisticated faith. To pinpoint where totalitarianism resides in Wyzanski’s oscillations, we must remember that it appears prominently in his initial portrait of lay constitutionalism. But what is interesting about Wyzanski is that over the course of his paper he transforms the naïve popular faith from a constitutional defensive, or negative, strategy to a positive one. Thus, not only is his layman’s constitutionalism basically more optimistic than anxious, Wyzanski ultimately adopts a faith even less touched by anxiety.

The conference commemorating the bicentennial of John Marshall’s birth was, as announced in the title of the proceedings, *Government Under Law*, a celebration of John Marshall’s role in forging legal controls over government. In a very real sense, the conference commemorated the role of judicial review set in motion by John Marshall and the place of *Marbury v. Madison*²⁵⁶ in the development of the legal system of the United States as well as its impact abroad. And in 1955, *Government Under Law* was quite conscious about the totalitarian alternative, government unencumbered by law. Yet, despite the important role of totalitarianism in the conference, that role—even in this very public celebration of constitutional limits—was muted and diffused in comparison to the anxious expressions of social and political scientists. Instead of worries about abuse of power from above or irrational explosiveness from below, there were the old concerns

252. *Id.*

253. *Id.* at 487.

254. *Id.* at 488.

255. *Id.* at 490.

256. 5 U.S. 137 (1803).

about an abusive judiciary, which hardly fit the totalitarian model, and pronouncements on government as a positive force. Perhaps the New Deal ideology was too strong in the law schools. One should not be surprised to find Charles Wyzanski, the former Solicitor for the Department of Labor, using a conference on *Government Under Law* as an opportunity to talk about “government through law.”

C. The Legal Process, *Spoiled Cantaloupes*, and the Nature of Law

In their introduction to Hart and Sacks’s *The Legal Process*—the mimeographed course materials taught at Harvard and numerous other law schools in the 1950s and 1960s—William Eskridge and Philip Frickey trace the book’s genealogy through several other incarnations and teaching materials to an “organic rationality” encouraged by the appearance of totalitarianism. Drawing from Edward Purcell, they maintain that “the realist-rationalist debate reached extraordinary proportions between 1938 and 1941, apparently because of anxieties felt by American intellectuals in light of the rise of fascism in Europe and reports of the Nazi atrocities against minority ethnic and religious groups.”²⁵⁷ What resulted, in part embodied by Lon Fuller’s *The Law in Quest of Itself*,²⁵⁸ was a new model of rationalism that fused the organic, historical movement of legal positivism—as opposed to a natural law stance—with a renewed moralism.²⁵⁹ For Eskridge and Frickey, this renewed moralism lay behind Hart and Sacks’s pronouncement that “[l]aw is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living.”²⁶⁰ In this genealogy, then, *The Legal Process*’s reasoned elaboration of purposive law had its genesis in anxieties about the Nazi state and the inability of legal positivism to deal with it, so much so that Eskridge and Frickey entitle their section on the early prehistory of *The Legal Process*, “Organic Rationality (Totalitarianism in Europe, 1921-41).”²⁶¹

In describing the movement of the legal process school from substance to procedure, Morton Horwitz writes:

Whether due to fear of conservative attacks on the ideal of “collaborative, cooperative living” or anxiety that any

257. William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* at li, lxv (1994).

258. LON L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940).

259. “As reinterpreted by scholars like Fuller, legal rationalism pressed the idea that law is policy toward an insistence that law be good policy, which was understood in an organic way to mean ‘purposive’.” Eskridge & Frickey, *supra* note 257, at lxvii.

260. *Id.* at xci-xcii (citing HART & SACKS, *supra* note 257, at 148).

261. Eskridge & Frickey, *supra* note 257, at lxii.

substantive conception of the common interest might degenerate into totalitarianism, *The Legal Process* expresses the belief of a dominant postwar generation of elite legal thinkers that “procedures . . . are obviously more fundamental than . . . substantive arrangements”²⁶²

Horwitz’s explanation may be set at a level of abstraction one degree higher than Eskridge and Frickey, but he, too, sees worries about totalitarianism informing *The Legal Process*. So too does Laura Kalman. In her description of the process theorists, she writes: “Haunted by the memories of the conservative Court in the early twentieth century and threatened by Stalinism, such legal scholars sought to domesticate realism, constrain judges, and separate law from politics.”²⁶³ In Eskridge, Frickey, Horwitz, and Kalman, we find Hart and Sacks framed by references to totalitarianism, whether in their purposive response to the relativism of legal realism or their avoidance of substance or politicized law as potentially totalitarian. We should turn to *The Legal Process* itself to see whether we can tease out of its depiction of the American legal process an underlying concern with totalitarianism.

Hart and Sacks begin *The Legal Process* by citing the growth in the world’s population: “In 1789 when the American republic was established some 800 million people inhabited the globe. Today, there are about 2,500 millions and the number is steadily increasing.”²⁶⁴ But they do this not so much to suggest a threat as a challenge. “These human beings,” they write, “have a great variety of wants, ranging from the common urge to secure the simple necessities of physical existence to the most subtle desires to achieve some sense of oneness with the universe.”²⁶⁵ In the next paragraph Hart and Sacks pronounce one of their major themes, that of human interdependence: “In the satisfactions of all their wants, people are continuously and inescapably dependent upon one another.”²⁶⁶ For Hart and Sacks, this is the core concern of social science: “The coexistence on the face of the same planet of these ever-changing and increasing millions of people, having these wants and such abilities to satisfy the wants under these conditions of interdependence, are the basic facts of social science and pose its basic problems.”²⁶⁷

It is at this point, having not yet mentioned the place of law, that

262. HORWITZ, *supra* note 15, at 255 (citing HART & SACKS, *supra* note 257, at 3-4).

263. KALMAN, *supra* note 23, at 41.

264. HART & SACKS, *supra* note 257, at 1.

265. *Id.*

266. *Id.*

267. *Id.* at 2.

Hart and Sacks make a transition, if in an inelegant equation, to their own discipline: “Law being a pervasive aspect of social science, the questions [of social science] pose problems which are basic also for lawyers.”²⁶⁸ We find in the opening paragraphs of *The Legal Process* Hart and Sacks framing the nature and purpose of law as basically distributive in character—law asks whose wants and which ones are to be encouraged or discouraged. Law hardly starts out its life in the pages of *The Legal Process* by summoning protections against the despotic state. Rather than a concern with “government under law,” it is a system of allocation to which we are introduced.

Hart and Sacks next begin to develop the theme of interdependence as community, but rather than the pathological “quest for community” that we hear from Robert Nisbet,²⁶⁹ Hart and Sacks talk more banally of interdependence as resulting in a “community of interest” and the creation of human groups. This is where law enters: “People need understandings about the kinds of conduct which must be avoided if cooperation is to be maintained.”²⁷⁰ Such understandings are not enough by themselves. Society needs a way to continue to clarify these understandings as it develops and a way to resolve disputes over these understandings.

This is where Hart and Sacks make their famous move to procedure, and they assert that

substantive understandings or arrangements about how the members of an interdependent community are to conduct themselves in relation to each other and to the community necessarily imply the existence of what may be called *constitutive or procedural* understandings or arrangements about how questions in connection with arrangements of both types are to be settled.²⁷¹

Horwitz is quite correct to move in his narrative of postwar legal thought from the legal process school to the process pluralism of Robert Dahl’s *A Preface to Democratic Theory*, for both assume a basic procedural agreement at the core of social ordering.²⁷² But unlike Dahl, with his Madisonian études that address the “tyranny of the majority,” Hart and Sacks write without threats either from an overpowering government or an overpowering populace. Rather, they create a mixed world of private and public ordering in which the “processes of private and official decision constantly interact”²⁷³ but

268. *Id.*

269. See generally NISBET, *supra* note 55.

270. HART & SACKS, *supra* note 257, at 3.

271. *Id.* (emphasis in original).

272. See HORWITZ, *supra* note 15, at 254–57.

273. HART & SACKS, *supra* note 257, at 7.

do not seem to threaten each other.

The first case in this casebook is “the case of the spoiled cantaloupes” about a fruit and vegetable wholesaler who was shipped a carload of cantaloupes (sold on a “rolling acceptance final basis”) that turned out to be decaying as a result of “cladosporium rot.”²⁷⁴ This may strike any American law school graduate as the standard stuff of casebooks, with all those wonderful who-deserves-what vignettes of the genre. But Hart and Sacks take fifty-seven pages to go through an entire range of “public” and “private” ordering implicated by the case. They quote extensively from the *Code of Federal Regulation* setting out the Department of Agriculture’s standard for what it means for a cantaloupe to be “U.S. Grade No. 1,” and to be “free from sunscald and decay”²⁷⁵ as well as from the Department’s definition of “rolling acceptance final.”²⁷⁶ Among the various ordering factors, they describe the impact of state law as well as “trade practice and understanding” before turning to the administrative disposition of the case in 1946, followed by the three federal court cases that stretched into 1948.

Hart and Sacks organize the “Notes and Queries” that follow the case materials by “perspectives”: “The Problem Through Martinelli’s Eyes,” “The Problem Through the Secretary’s Eyes,” “The Problem Through the Courts’ Eyes,” and “The Problem from an Olympian Point of View.” The Notes and Queries contain all sorts of questions about fairness and ethics. For example, the series of questions at the end of the cantaloupe problem includes a question about whether the recipient of the cantaloupes had a “good reason to believe that it was legally free to abandon the carload to the railroad? . . . Was it ethical for it [to] do so?”²⁷⁷ Similarly, Hart and Sacks ask: “Does justice require that people be told in advance what will happen to them if they do wrong so that they will be better able to judge whether to do right?”²⁷⁸ There are suggestions about consistency and questions about the court’s role if it “had relied solely upon an intuitive *ad hoc* sense of what is fair.”²⁷⁹ In their discussion of the “Olympian Point of View,” Hart and Sacks turn to a comparative question about the Soviet system in the context of the need for “[a]n adequate supply of fresh fruits and vegetables”: “Consider whether the opportunities for the supply of winter fruits and vegetables within the Soviet Union, with its single national market governed by

274. *Id.* at 10-11.

275. *Id.* at 17 n.10.

276. *Id.* at 19.

277. *Id.* at 60.

278. *Id.*

279. *Id.* at 63.

a single institutional system, are comparable to those in the United States.” This note is followed by the kicker: “Is the Soviet system better adapted to securing a good supply?”²⁸⁰ They push the comparison further: “Think, in particular, about the various assignments of legal power as well as the distribution of practical ability to make effective decisions which the law governing the interstate trade in fresh fruits and vegetables in the United States exhibits.”²⁸¹

We have at the end of Hart and Sacks’s cantaloupe odyssey one of the very few explicit references in *The Legal Process* to the totalitarian state, and the clear implication of the comparison is the superiority of the American legal system with its multiple levels of legal ordering. All of those legal actors, the list of factors of private and public ordering, and the various “perspectives” of the notes constitute the legal process. It is not so much pluralistic as multi-layered. But amidst the multiple layers, one of the constant refrains of *The Legal Process* is the word “technique.” Hart and Sacks repeatedly refer to various “techniques,” as in their discussion of “The Development of More Elaborate Techniques: Regulation Through Delegated Rulemaking Power”²⁸²—even to the extent of being able to refer to a “technique of non-control.”²⁸³ Ironically, the word “techniques,” as well as “controls,” another constantly repeated word in *The Legal Process*, summon up democratic faith more than they suggest the technocratic clichés of the totalitarian state. Fundamentally, Hart and Sacks’s legal order is a complicated machinery of techniques and controls, and their democracy relies on just those devices. Repeating Hart’s argument from the Marshall commemorative, Hart and Sacks state that

the problem of government is primarily affirmative and not negative. Abuses, both private and official, have to be prevented, so far as they feasibly can be. But what was ultimately important was the elicitation of the affirmative performances, both of officials and private persons, which were needed to maximize the satisfactions of human wants.²⁸⁴

The real check “upon official behavior” is “provided by institutional understandings, including both craft techniques and accepted ideals of how officials ought to behave.”²⁸⁵ Interestingly, it is not the Constitution that provides this check. In fact, according to Hart and

280. *Id.* at 67.

281. *Id.*

282. *Id.* at 915.

283. *Id.* at 845.

284. *Id.* at 157.

285. *Id.*

Sacks, “[c]onstitutional impediments to centralized direction, in those matters in which there is no compelling need for national action, appear as safeguards against impairments of the viability of the social mechanism as a whole.”²⁸⁶ The Constitution’s role here is to assure “alternative means of working out by common action, through various groupings of interest, solutions of problems which cannot be settled unilaterally.”²⁸⁷

As is clear from these passages, *The Legal Process* expresses none of the anxiety either about the abusive state or the uncontrollable mob that seems to have plagued so much of the social and political theory of the 1950s. Indeed, Hart and Sacks’s course materials show no particular nervousness about the health of the Republic. But that does not exclude totalitarianism as a reference point for Hart and Sacks. Indeed, what is striking about their portrait of the American legal process is the diffusion of power it implied. As Eskridge and Frickey point out in their introductory essay, *The Legal Process* depicts “a government of dispersed power.”²⁸⁸ It may be that exactly such an image of American government could be romanticized only against the background, even if distant, of the totalitarian state. Hart and Sacks were not, as Laura Kalman suggested, separating law from politics so much as they were making law very political—except that the politics were multi-layered and dispersed. But even if totalitarianism is an implicit point of comparison in *The Legal Process*, the book contains no hint of anxiety and no concern about the state of American society.

D. Lon Fuller’s Inner Morality and Herbert Wechsler’s Neutrality

Edward Purcell identified Lon Fuller’s 1940 lectures on *The Law in Quest of Itself*²⁸⁹ as part of the attack on positivism as a road to totalitarianism.²⁹⁰ Fuller would continue to develop his attack on positivism in his famous 1958 exchange with H.L.A. Hart in the *Harvard Law Review*,²⁹¹ using Hart’s nuanced expression of legal positivism as a foil. Hart maintained that in extreme cases law is simply “too evil to be obeyed,”²⁹² thereby escaping some of the criticism of the law-as-command position traditionally associated with Austinian legal positivism. He spoke about purposive, socially

286. *Id.* at 160.

287. *Id.*

288. Eskridge & Frickey, *supra* note 257, at xciv.

289. FULLER, *supra* note 258.

290. See PURCELL, *supra* note 9, at 161-64.

291. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *supra* note 29.

292. Hart, *supra* note 291, at 620.

directed decisions that are made in the penumbra or gaps where a law is not explicit, while denying that it is morality that enters in the penumbral decision. Hart's moves did not save him, and, as Richard Primus points out, the German experience is at the center of Fuller's answer to Hart.²⁹³

For Fuller, the Nazi example was Hart's undoing. "Without any inquiry into the actual workings of whatever remained of a legal system under the Nazis," Fuller suggested, "Professor Hart assumes that something must have persisted that still deserved the name of law in a sense that would make meaningful the ideal of fidelity to law."²⁹⁴ Fuller was quick to point out that, for Hart, disobedience to the Nazi state "presented not a mere question of prudence or courage, but a genuine moral dilemma in which the ideal of fidelity to law had to be sacrificed in favor of more fundamental goals."²⁹⁵ For Fuller, the Nazi example finally disproved the positivist position and its emphasis on fidelity to law. And even though he briefly moved out of his discussion of the Nazis by claiming that "[i]t is not necessary, however, to dwell on such moral upheavals as the Nazi regime to see how completely incapable the positivistic philosophy is of serving the one high moral ideal it professes, that of fidelity to law,"²⁹⁶ Fuller does indeed "dwell" on the Nazi example.

After debating Hart on the postwar legal difficulties created by the emergence from the Nazis and the position of the German legal theorist Gustav Radbruch, Fuller turns to the most biting part of his attack on legal positivism and his suggestion of a "causal connection" between positivism and the rise of the Nazis. He sets the stage by declaring that "[i]t should be recalled that in the seventy-five years before the Nazi regime the positivistic philosophy had achieved in Germany a standing such as it enjoyed in no other country."²⁹⁷ And within a page, although with the disingenuous softness of circumlocution, he comes to his conclusion: "In the light of these considerations I cannot see either absurdity or perversity in the suggestion that the attitudes prevailing in the German legal profession were helpful to the Nazis."²⁹⁸ To push the point further, Fuller observed that Hitler "did not come to power by a violent revolution" but by the "exploitation of legal forms."²⁹⁹ Lawyers and

293. See Primus, *supra* note 25, at 422-24.

294. Fuller, *supra* note 29, at 633.

295. *Id.*

296. *Id.* at 646. Primus also notes that this sentence seems to be an exit out of Fuller's discussion of the Nazi state, but that Fuller returns to the discussion two pages later. See Primus, *supra* note 25, at 433.

297. Fuller, *supra* note 29, at 658.

298. *Id.* at 659.

299. *Id.*

judges did not do their part: “The first attacks on the established order were on ramparts, which, if they were manned by anyone, were manned by lawyers and judges. These ramparts fell almost without a struggle.”³⁰⁰ Fuller clearly establishes his case: The legal positivism that dominated German jurisprudence paved the road to Hitler.

By focusing so dramatically on the Nazis, Hart and Fuller were playing a high-stakes game. Hart understood fully that the Nazi example was the main critical weapon against legal positivism, so he attempted to address the Nazi issue preemptively.³⁰¹ It was predictable that Fuller would use the Nazi example to full advantage. By using the term “game” and “advantage,” I do not mean to suggest that these were not earnest matters for Hart and Fuller. Nevertheless, as deeply important as these issues were to each of them, what is interesting is how little all of this talk of Hitler and the Nazi state seemed to suggest a present threat, a pathology still under way. Certainly, the Nazi example implied that the road to Hell is always there, always possible, but Fuller does not make that road seem very close, nor its totalitarian end imminent. In fact, Fuller is perhaps at his most interesting in discussing not Germany’s path to totalitarianism but instead, the postwar dilemmas faced by the Germans in the wake of the Nazis. “Germany,” he explains, “had to restore both respect for law and respect for justice. Though neither of these could be restored without the other, painful antinomies were encountered in attempting to restore them both at once, as Radbruch saw all too clearly.”³⁰² The troubles the Germans experienced resolving those antinomies is quite a significant point for Fuller, but provides no immediacy for the readers of the *Harvard Law Review* in 1958.

Only on the last page of his response to Hart, after discussing the Nazis’ coercion of traditionally voluntary acts, did Fuller briefly come closer to home:

Questions of this sort are undoubtedly becoming more acute as the state assumes a more active role with respect to economic activity. No significant economic activity can be organized exclusively by “don’ts.” By its nature economic production requires a co-operative effort. In the economic field there is special reason, therefore, to fear that “This you may not do” will be transformed into “This you must do—but willingly.”³⁰³

300. *Id.*

301. As Primus writes, “[a]nticipating one of Fuller’s attacks, Hart explicitly denied that German legal positivism helped the Nazi regime to rise.” Primus, *supra* note 25, at 432.

302. Fuller, *supra* note 29, at 657.

303. *Id.* at 672.

This short passage comes across as little more than an aside, even in its privileged position on the final page of Fuller's essay. If the double-speak of enforced voluntarism—"This you must do—but willingly"—has all the Orwellian perverseness of totalitarian thought patterns, Fuller's essay does not make the threat real.

If Fuller's essay does not suggest a present danger, the perverseness of enforced voluntarism ties back to his main theme, the "internal morality of law." In his debate with H.L.A. Hart, Fuller established an "external" and an "internal" morality of law. For Fuller, the "authority to make law must be supported by moral attitudes that accord to it the competency it claims."³⁰⁴ This authority, Fuller explains, derives from the "morality external to law."³⁰⁵ But the morality that is really critical for Fuller is the "inner morality of the law," which gives law its principled coherence. "Professor Hart," Fuller observes, "seems to assume that evil aims may have as much coherence and inner logic as good ones."³⁰⁶ To this position Fuller responds flatly: "I, for one, refuse to accept that assumption."³⁰⁷ In his rejection of an "immoral morality," Fuller states in a feigned confessional mode: "I shall have to rest on the assertion of a belief that may seem naïve, namely, that coherence and goodness have more affinity than coherence and evil."³⁰⁸ As Anthony Sebok has recently described, the key to Fuller's discussion of the Nazis was an attempt to establish that evil regimes "could never, in principle, have law."³⁰⁹ That explains Fuller's answer to the postwar dilemma created by the woman who caused her husband to be prosecuted for his criticisms of Hitler: Fuller maintained that the law under which the woman had her husband prosecuted had not been law in the first place.³¹⁰ But, in a sense, Fuller may have been undermining his own position. At one point he went so far as to ask: "If we felt that the law itself was our safest refuge, would it not be because even in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerances, and inhumanities into law?"³¹¹ Law seems to have some moral force even in the most evil regimes. And

304. *Id.* at 645.

305. *Id.*

306. *Id.* at 636.

307. *Id.* This is a key passage in Tony Sebok's analysis of Fuller's position. For Sebok's discussion, see ANTHONY J. SEBOK, *LEGAL POSITIVISM AND MODERN AMERICAN JURISPRUDENCE* 160-69 (1998).

308. Fuller, *supra* note 29, at 636.

309. SEBOK, *supra* note 307, at 165.

310. *See id.* at 219-20. In 1949, the German postwar court that was prosecuting the wife for having turned her husband over to the Nazis was forced to address her defense, which "rested on the ground that her husband's statements to her about Hitler and the Nazis constituted a crime under the laws then in force." Fuller, *supra* note 29, at 653.

311. Fuller, *supra* note 29, at 637.

unwittingly, his discussion of all the “secret” laws of the Nazi state, despite their obvious perversion of the normal working of law, suggests a sort of embarrassment on the part of the Nazi state. What is interesting is not that the laws were secret but that the Nazis felt a need to refer to law at all. It is clear that they were dealing with a population culturally accustomed to legal codification.

After setting out the differences between the external and internal moralities of law, Fuller claims that they “reciprocally influence one another” and a “deterioration of the one will almost inevitably produce a deterioration in the other.”³¹² In fact, “[s]o closely related are they that when the anthropologist Lowie speaks of ‘the generally accepted ethical postulates underlying our . . . legal institutions as their ultimate sanction and guaranteeing their smooth functioning,’ he may be presumed to have both of them in mind.”³¹³ This reference to Robert Lowie is quite telling. Despite the famous final sentence of *Primitive Society* in which Lowie spoke of “that planless hodgepodge, that thing of shreds and patches called civilization,”³¹⁴ Lowie was basically a functionalist³¹⁵ who pushed a multiple causal theory of social organization,³¹⁶ and we can read Lowie’s functionalism back into Fuller’s moralities of law and emphasis on coherence. Ultimately, one may describe Fuller’s inner morality as a procedurally oriented functionalism that, however, rests on “an assertion of a belief that might seem naïve” that it could lead to the good.

The logical extension of Fuller’s “inner morality of law” is Herbert Wechsler’s famous Holmes lecture, *Toward Neutral Principles of Constitutional Law*, in which he took the Supreme Court to task for not basing its decision in *Brown*³¹⁷ on neutral principles that would not show bias to one group’s claim or another’s. “A principled decision, in the sense I have in mind,” Wechsler explains, “is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”³¹⁸ For Gary Peller, the move to the non-ideological represented by Wechsler’s neutral principles followed Dewey’s lead. Peller explains that Dewey did not equate relativism

312. *Id.* at 645.

313. *Id.*

314. ROBERT LOWIE, *PRIMITIVE SOCIETY* 441 (Liveright 1947) (1920).

315. On the misunderstanding of Lowie’s “shreds and patches” line as suggesting Lowie’s overall anti-functionalism, see MARVIN HARRIS, *THE RISE OF ANTHROPOLOGICAL THEORY: A HISTORY OF THEORIES OF CULTURE* 353 (1968).

316. See, e.g., Robert Lowie, *Social Organization*, 13/14 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 141-48 (Macmillan 1937) (1934).

317. *Brown v. Board of Education*, 349 U.S. 294 (1955).

318. Wechsler, *supra* note 221, at 27.

with surrender to totalitarianism, as so many of the critics of legal realism argued.³¹⁹ Rather, Peller's Dewey saw philosophical absolutism that encouraged totalitarianism.³²⁰ Primus has similarly found the foundationalist response to totalitarianism matched by what might be called an anti-foundationalist or, rather, anti-dogmatic response to totalitarianism,³²¹ and he has identified Wechsler's neutral principles argument as a species of the anti-dogmatic response to totalitarianism, which "stressed the evil of dogmatic ideologies."³²² More specifically, Primus has told us that Wechsler "explicitly acknowledged that his concern for neutrality had roots in the confrontation with Nazism and specifically in his experience at Nuremberg."³²³ This acknowledgment occurs in interviews for the Columbia Oral History Research Project.³²⁴ In answer to the question of whether the 1959 *Neutral Principles* article stemmed from his Nuremberg experience, Wechsler responded:

I wouldn't put it that way. On the other hand, what I wrote about Nuremberg—particularly my emphasis on the importance, in that undertaking, that we judge the enemy only by standards that we would apply to ourselves—does represent an articulation of my belief in neutral principles back then. My whole effort in the Nuremberg thing, in which I think I was on the whole quite successful in strengthening the natural instinct of Judge Biddle to perform in this way, was to persuade him that in reaching judgment at Nuremberg, only standards that we felt confident we would be ready to apply to ourselves should prevail.³²⁵

What is clear from this statement is that the Nuremberg connection to Wechsler's advocacy of neutral principles arose from the troubling question of "victor's justice" raised by the trials and not from the fact that Wechsler in Nuremberg had come face-to-face with the brutality of the Nazi state.

Having said that, Wechsler's adoption of the abstract category of "neutrality"—as well as the legal process school's more general

319. According to Peller, Dewey felt that "value-relativism did not lead to condoning the fascists." Peller, *supra* note 24, at 583.

320. *See id.* at 583-84.

321. Primus does not refer specifically to "anti-foundationalism" but I have chosen to do so to underline the fact that we can identify either end of the foundational/anti-foundational spectrum as a response to totalitarianism. That, of course, does not mean that Primus is wrong in his identification of specific cases, but this case-by-case method makes it too easy to slot any legal writing in one of these two categories.

322. Primus, *supra* note 25, at 427.

323. *Id.* at 433 n.68.

324. *See* Norman Sibling & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854 (1993).

325. *Id.* at 930.

move from substance to procedure—may very well have been motivated by a revulsion against the dogmatic nature of totalitarianism. As mentioned above, Dewey responded to that dogmatism by maintaining what Peller described as an “open-ended method,” and in light of Dewey’s immense stature well into the 1950s, it should not be surprising that his views would be shared by “the mainstream fifties thinkers.”³²⁶ Indeed, Wechsler may have crafted his “neutral principles” in Dewey’s wake. Unfortunately, there is little in *Toward Neutral Principles* that explicitly suggests a fear of the ideological. Rather, there are concerns that a court case might “turn on the immediate result,”³²⁷ that is, a judgment might be driven by a single constituency. What Wechsler feared was the court functioning “as a naked power organ.”³²⁸ But fearing an overly political court seems a long way away from a fear of totalitarianism. If Wechsler spoke of “danger,” it was only in the context of the “danger of the imputation of a bias favoring claims of one kind or another.”³²⁹ There was no threat of uncontrollable mobs or of governmental brutality, just courts drifting too far into politics and a *Brown* Court that based its decision on the wrong reasoning.³³⁰

E. James Willard Hurst and the Conditioning of Freedom

In 1956 Willard Hurst published a short reading list of “Social Science on a Lawyer’s Bookshelf” for the Wisconsin Bar.³³¹ The list is a wonderfully faithful rendition of the core thematics of history and social science of the 1950s. It begins with “Political history” split between “The event as laboratory instance,” including Perry Miller and C. Vann Woodward’s *Reunion and Reaction*, and “Ideas and environment: the importance of the commonplace” listing three volumes by Richard Hofstadter (among them the recently published *The Age of Reform* and *The American Political Tradition*), Henry Nash Smith’s *Virgin Land*, Vernon Parrington, and, of course,

326. Peller, *supra* note 24, at 583.

327. Wechsler, *supra* note 221, at 17.

328. *Id.*

329. *Id.* at 14.

330. “The problem inheres strictly in the reasoning of the opinion, an opinion which is often read with less fidelity by those who praise it than by those by whom it is condemned.” *Id.* at 44.

331. A version of this bibliographical list appears (with checks marked by Felix Frankfurter as to the books he had read) in the Felix Frankfurter Papers at the Library of Congress, reel 42 (May 10, 1956). Daniel Ernst drew my attention to this revealing document. I have provided an in-depth analysis of the intellectual force fields acting on Willard Hurst’s *Law and the Conditions of Freedom in the Nineteenth-Century United States*, including Hurst’s engagement and debate with the titles in his book list for the Wisconsin Bar, in Carl Landauer, *Social Science on a Lawyer’s Bookshelf: Willard Hurst’s Law and the Conditions of Freedom in the Nineteenth-Century United States*, 18 L. & HIST. REV. 59 (2000).

Charles Beard. The next section of the list—reflecting the associated vogues for anthropology, psychology, and sociology—appears under the title “Anthropology, Social Psychology, Sociology: cf. Social History” and includes Ruth Benedict’s *Patterns of Culture* and Abraham Kardiner’s *The Psychological Frontiers of Society* before turning to a subsection on “National character” that includes Oscar Handlin’s *The Uprooted* a few titles up from David Riesman’s *The Lonely Crowd*. The third and longest section of the list, devoted to the “The politics of the economy,” includes Berle and Means’s *The Modern Corporation*, Peter Drucker’s *Concept of the Corporation*, and Karl Polanyi’s *The Great Transformation*, as well as books by Louis Hartz, Joseph Dorfman, and John Kenneth Galbraith. In short, Willard Hurst’s suggestions for the lawyer’s social science bookshelf are evocative of the history and social science tastes of the mid-1950s, and it is hardly surprising to discover the close parallel between the reading list and the endnotes to Hurst’s *Law and the Conditions of Freedom in the Nineteenth-Century United States*.

As mentioned earlier, the second endnote of *Law and the Conditions of Freedom* supports the point that the “release-of-energy faith demonstrated in our law expressed one aspect of a social value scale which measured men by their accomplishment in striving toward self-appointed material goals rather than by their status” by citing Karen Horney’s *The Neurotic Personality of Our Time* and Margaret Mead’s *And Keep Your Powder Dry*.³³² With this obvious tie to the main currents of social science writing, we confront the question whether Hurst replicated the totalitarian anxieties of that writing or the psychopathological diagnosis of American society.

Hurst begins his slim volume with the famous discussion of the Pike Creek squatters’ “constitution.” In 1836 these Wisconsin squatters—“put less sympathetically, they were trespassers”³³³—illegally occupied land on the southeastern shore of Lake Michigan before the federal survey was complete so they could take possession of the land, having lawfully created a “Claimants’ Union” to defend their position. For Willard Hurst, this episode in frontier history replaces the myth of “frontier justice” with a window onto the “working legal philosophy of our nineteenth-century ancestors.”³³⁴ This begins Hurst’s discussion of the main aim of early nineteenth-century law as an effort to create the conditions for the “release of

332. HURST, *supra* note 64, at 109, 109 n.2 (citing KAREN HORNEY, *THE NEUROTIC PERSONALITY OF OUR TIME* (1937); MARGARET MEAD, *AND KEEP YOUR POWDER DRY: AN ANTHROPOLOGIST LOOKS AT AMERICA* (1942)).

333. *Id.* at 3.

334. *Id.* at 3.

creative human energy.”³³⁵ The opening pages are drawn with such sympathy for the “trespassers” that it is clear that Hurst does not see anything dangerous in their association. Despite the presence of Richard Hofstadter in his endnotes and on his reading list, Hurst does not find the pathological element in the claimant association of Pikes Creek.

Hurst’s book traverses the nineteenth century and enters the twentieth century with an occasional reference to the New Deal and the 1950s, and one can expect that the romantic flair with which he opened his book will soon dissipate, that he will move away from a romanticism about the frontier emphasis on human creativity and toward a more somber mood as his America industrializes in the mid- and late-nineteenth century. Indeed, the very market-oriented community that encouraged the “release of creative energies” had its social costs.³³⁶ Hurst described the dislocations brought by urbanization and industrialization. He observed that “great expectations made frustration the more bitter.”³³⁷ “The people of the new metropolis,” he wrote, “found their disappointment hardest to express, for they lacked a justifying tradition of urban protest.”³³⁸ In addition to the “bewildered anger and searching of jobless native workers” in the cities, Hurst describes the farmers as “bewildered and angry as they struggled in the market net.”³³⁹ But if Hurst speaks of “unaccustomed thrusts of desire and fear in society”³⁴⁰ and turns in his discussion of protest movements like the Farmers’ Alliance, the Grange, and the Knights of Labor to the anthropologist Ralph Linton for his observations on group psychology, he talks about the members of these protest movements “using law positively.”³⁴¹ Right after quoting Linton’s *The Cultural Background of Personality* at length, Hurst writes: “But law was also part of the frame of reference in this society and culture—in the form of the centuries-old Western tradition of constitutionalism.”³⁴² It seems that neither the Wisconsin squatters nor those dislocated at the end of the nineteenth century ventured far from the legalistic traditions of the country: The law is

335. *Id.* at 5.

336. Here Hurst’s debt to Karl Polanyi’s *THE GREAT TRANSFORMATION* (1944) was critical. For Hurst’s acknowledgment of his debt to Polanyi, see Aviam Soifer, *In Retrospect: Willard Hurst, Consensus History, and the Growth of American Law*, 20 REV. AM. HIST. 125, 141 n.12 (1992), and for a comparison of Hurst’s view of the market and Polanyi’s, see Landauer, *supra* note 331, at 82-85.

337. HURST, *supra* note 64, at 73.

338. *Id.* at 74.

339. *Id.*

340. *Id.* at 85.

341. *Id.* at 86.

342. *Id.*

always framed to provide the “conditions of freedom.”

Robert Gordon has described Hurst as “an intensely committed moralist, for whom the past is full of dreadful warnings.”³⁴³ But *Law and the Conditions of Freedom* does not seem so full of warning. Even at the height of struggle, the viewpoints were not so disparate. Describing the period of rapid change from roughly 1870 to 1910, Hurst observes that “[i]nterest group conflict in plenty marked the statute books and judicial opinions.”³⁴⁴ However, “the hard pressed positions and the angry tones among the major interests continued to be those of dispute within the family of middle-class values which had set the dominant policy tone of our society from our constitution-making generation on.”³⁴⁵ Similarly, Hurst writes that “[a] good deal of flamboyant talk of ‘class’ conflict colored the oratory of farm revolt in the nineties” and then counters: “But the morale of agrarian politics really rested on the continued Jeffersonian vision of a middle-class society of independent yeomen.”³⁴⁶

Hurst advances beyond the Hartzian vision of a narrowly middle-class society to suggest that change itself may have contributed to absence of class conflict:

Probably the pace of change after 1870 did as much as anything else to brake the development of a broad and lasting consciousness of class division. Events so hurried us from one society into another that we were living in a new order, with our old frames of reference, before we began fully to realize what had happened.³⁴⁷

The resulting ethos of late nineteenth-century change was a shift toward a “more rational calculus in the total economy.”³⁴⁸ Here Hurst describes an America finally moving after its inability to understand the social costs of its economic progress “toward a concept of social cost accounting.”³⁴⁹ Rather than violence and crowd psychology, Hurst describes a shift toward a Progressive agenda—the growth of public health, labor law, and consumer protection.

If there is little violence in Hurst’s narrative, there are important parts of the story that are hardly positive:

Whether the record was of premature depletion of energy

343. Robert Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 L. & SOC’Y REV. 9, 48 (1975).

344. HURST, *supra* note 64, at 94.

345. *Id.*

346. *Id.* at 95.

347. *Id.*

348. *Id.* at 96.

349. *Id.*

sources (as in fruitless burning off of natural gas or improper drilling for oil), the pollution of water supply and destruction of fish life (through dumping of mineral or industrial cast-offs), the exhaustion of game (by reckless commercial hunting of pigeons, geese, or buffalo, for example), or soil erosion or air pollution, the story of nineteenth-century public policy ran the same course. First we wasted natural resources because we could not see their use or because they were in the way of some immediate goal. Next our expanding markets would suddenly produce a rush and a scale of demand which encouraged headlong, unplanned profit taking.³⁵⁰

This passage provides a preview of Hurst's later work on the lumber industry in Wisconsin³⁵¹ and its depiction of the inability of Wisconsin's legal regime to prevent the industry's self-destruction.³⁵² This paragraph and Hurst's later book on lumber are tales of a failed system, but even in Hurst's most somber mood, we are far from the totalitarian fears of other historians and social scientists. Hurst may have identified some of the costs of the economic and political values of a growing America, but those costs do not suggest the nightmarish potential of a totalitarian state.

In his essay on Willard Hurst, Robert Gordon claims that the "great strength that his historical work derives from his pragmatist's vision is the outsider's perspective."³⁵³ But the voice of *Law and the Conditions of Freedom in the Nineteenth-Century United States* was hardly that of the outsider. One of the interesting elements in Hurst's mode of writing is that throughout the book he uses the first-person plural over and over again. Hurst writes that "we had begun our national history,"³⁵⁴ "we used law,"³⁵⁵ "we pressed,"³⁵⁶ "[w]e were willing to incur,"³⁵⁷ "we learned to regard,"³⁵⁸ "[w]e confronted,"³⁵⁹ and "[w]e had to learn."³⁶⁰ This list is just a small sample. Clearly, Hurst's is a narrative that creates little distance between author and subject. Hurst makes the American past his past—he seems to be there, using, pressing, learning, confronting, and so forth. In his famous critique of Vernon Parrington in *The Liberal Imagination*,

350. *Id.* at 99.

351. J. WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915* (1964).

352. On Hurst's lumber book, see Gordon, *supra* note 343, at 50-52.

353. *Id.* at 50.

354. HURST, *supra* note 64, at 95.

355. *Id.* at 53.

356. *Id.* at 67.

357. *Id.*

358. *Id.* at 35.

359. *Id.*

360. *Id.* at 75.

Lionel Trilling observes:

Parrington's characteristic weakness as a historian is suggested by his title, for the culture of a nation is not truly figured in the image of the current. A culture is not a flow, nor even a confluence; the form of its existence is struggle, or at least debate—it is nothing if not a dialectic.³⁶¹

With all of Willard Hurst's first-person plural references, Trilling's complaint may well be equally applicable to Willard Hurst's *Law and the Conditions of Freedom*.

F. Edmond Cahn's Moral Constitution

In 1955, New York University law teacher Edmund Cahn published *The Moral Decision*,³⁶² which ranged in subject matter from the moral issues of marriage relations to constitutional issues of due process, and Cahn drew from Kant and Kierkegaard, Plato and Charles Sanders Peirce, Thoreau and the Talmud for his analysis. It is clear that we have entered the realm of a moral philosopher, and from the first page of his first chapter on "Morals as a Legal Order," Cahn attacks the "moral confusion in our times."³⁶³ He makes clear that the confusion was a result of the move that Edward Purcell ascribes to non-Euclideanism,³⁶⁴ whether in the form of historical anthropology or the promotion of semantics by Charles Ogden and I.A. Richards:

Probably not since the days when the Sophists carried their skepticism from city to city in ancient Greece have men been so afflicted with uncertainty. Dazzling economic and social transformations, the popularization of scientific method and the cynicism bred of world wars, the observation of foreign societies and exotic customs, the growth of relativism and hedonism in philosophy, and the development of sophisticated semantics—all have challenged the established landmarks and eradicated the familiar lines between the moral and the immoral.³⁶⁵

Indeed, Cahn seems to have summoned much of the same catalog of the sources of relativism that appears in Purcell's study. In a list that includes Harold Lasswell, Myres McDougal, Henry Hart, and Lon Fuller, Eugene Rostow identifies Edmund Cahn in 1962 as one of the scholars whose "work has helped to correct and offset the

361. LIONEL TRILLING, *THE LIBERAL IMAGINATION: ESSAYS ON LITERATURE AND SOCIETY* 9 (Scribner's 1976) (1950).

362. EDMUND CAHN, *THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW* (New Midland Book ed., Indiana Univ. Press 1981) (1955).

363. *Id.* at 9.

364. See PURCELL, *supra* note 9, at 47-73.

365. CAHN, *supra* note 362, at 9.

relative neglect of the problem of values which characterized the more positivistic outlook of the earlier legal realists.”³⁶⁶ As Rostow suggests in his footnote: “This theme in the American literature corresponds to a worldwide revival of interest in the problem of standards for law, stimulated by the problem of law under circumstances of fascist and communist dictatorship.”³⁶⁷ Cahn writes of “sickening and panicky doubts”³⁶⁸ about the moral order—combining the terror and nausea of Kierkegaard and Sartre—but the question remains whether his reassertion of moral thinking and suggestion of a “moral habit”³⁶⁹ clearly refer to the totalitarian challenge.

Cahn’s approach to discussing the relationship of law and morality is to embrace complexity. He describes skepticism and naturalism as “two massive roadblocks standing in our way.”³⁷⁰ He tells us that pure naturalism “need not delay us long, for the history of continual mutations in its so-called ‘immutables’ is too familiar.”³⁷¹ Similarly, morals are not merely mores for Cahn: “That, of course, is the reason why we are capable of passing moral judgments on what we believe to be accepted and customary social practices.”³⁷² In fact, like other legal thinkers of the 1950s, Cahn was quite aware that the question of law and morality was rife with antinomies. “American attitudes toward the law from our national beginnings down to the present day,” Cahn tells us, “make up a history of fierce and unresolved tension.”³⁷³ He describes a sort of schizophrenia regarding the law: “On the one side, there has been an uncritical and excessive trust in what can be accomplished through legislation and policing, while, on the other side, there has been an equally unwarranted mistrust of the law and of social control by means of government.”³⁷⁴ And finally he describes as “entirely right” a “pragmatic position” that “acknowledges the active existence of moral values along with other, non-moral elements in the law.” He also endorses an understanding that “while some moral precepts are enforced by the courts, others are not, and that only conventions and customs of the times determine whether to enforce a precept here or

366. EUGENE V. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* 21 (1962). Rostow also lists Felix Cohen, F.S.C. Northrop, Friedrich Kessler, and Jerome Hall. *See id.*

367. *Id.* at 21 n.26.

368. CAHN, *supra* note 362, at 10.

369. *Id.* at 23.

370. *Id.* at 25.

371. *Id.*

372. *Id.* at 26.

373. *Id.* at 35.

374. *Id.*

remit it there.”³⁷⁵ In working out these ideas, Cahn may have used unmodulated positions as foils, but he did not introduce communism or fascism into his moral narrative.

The core of Cahn’s book consists of episodic analyses, each starting with a short description of a case. In his introduction, Cahn writes: “As we draw on the law’s experience, we shall deal with the homely concerns of human existence from birth and the beginning, through the entire cycle of growth, love and ambition, desire and anxiety, until we come to death and the end.”³⁷⁶ Cahn narrates little episodes of annulled marriages, commercial fraud, and a banker who could be liable for maliciously setting up a competing barber shop to run a man he despised out of business. But among these exotic tales of day-to-day life, Cahn introduces several politically charged narratives. These include the Supreme Court’s decisions in the two related Jehovah’s Witnesses cases³⁷⁷ and in *Steele v. Louisville & Nashville Railroad Co.*,³⁷⁸ where the Court held that Bester William Steele, an African-American fireman, could enjoin the all-white Brotherhood of Firemen from replacing him with a more junior white member of the union.³⁷⁹ But not even these politically charged cases raise the threat of the totalitarian state. In Cahn’s discussion of the *Steele* case, Cahn asserts that “an *official* act of bigotry implicates every adult member of the political community.”³⁸⁰ He then hypothesizes that “[i]f we lived under a despotic form of government, we might be able to escape this burden of vicarious involvement.”³⁸¹ In essence, the despotic state only appears in Cahn’s book in a counterfactual hypothesis, not even embodied as the Soviet or Nazi state.

G. Myres McDougal’s Policy-Oriented Cold War

Neil Duxbury has described the policy-oriented international legal work of Myres McDougal as a “cloak for Cold War chauvinism.”³⁸² If one looks at the twelve, mostly co-authored articles that were collected in the one-thousand-plus-page *Studies in World Public Order* in 1960,³⁸³ it is unquestionable that McDougal and his

375. *Id.* at 47.

376. *Id.* at 5.

377. *See id.* at 175-76 (citing *Marsh v. Alabama*, 326 U.S. 501 (1946); *Tucker v. Texas*, 326 U.S. 517 (1946)).

378. *See id.* at 154-55 (citing *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 768 (1952)).

379. *See id.*

380. *Id.* at 163.

381. *Id.*

382. NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 197 (1995).

383. *STUDIES IN WORLD PUBLIC ORDER* (Myres S. McDougal et al. eds., 1960).

associates were fighting the Cold War in print. That is particularly apparent in the essay, *The Veto and the Charter*, a brief in response to the Soviet claim that its absence during the Security Council vote on the North Korean invasion of the South should have negated the vote.³⁸⁴ Similarly, the essay justifying under international law the U.S. hydrogen bomb tests conducted in the Marshall Islands is an unalloyed piece of Cold War advocacy.³⁸⁵

Over and over again in the various articles that comprise the *Studies in World Public Order*, McDougal and his various associates describe human dignity as the key value for international law and make it patently clear that it is a value the Soviets and the Chinese do not share. McDougal's 1959 essay, *Perspectives for an International Law of Human Dignity*, forcefully states that

[t]he overriding struggle for most comprehensive completion is, of course, between totalitarian orders, which explicitly demand the employment of force as an instrument of expansion and postulate the monopolization rather than wide sharing of many important values, and the nontotalitarian orders, with a dominant democratic core, which authorize the use of force only for conservation of values in freedom, safety, and abundance.³⁸⁶

He writes of the "unprecedented stakes in this struggle" and of "unprecedented peril." Yet despite the peril and the struggle, McDougal's prose is suffused with confidence, and somewhat surprisingly, it seems to be a confidence about the role of the scholar and of theory.

McDougal explains:

The task which I have set myself is to consider as systemically as possible what those of us who are genuinely committed to the values of human dignity may do, in our specialized roles as scholars, advocates, counselors, negotiators, and decision-makers, to establish and maintain the perspectives best described to help move mankind from its present precarious balance of terror toward a more complete world public order—toward an integrative universalism—in which the values of human dignity may be fulfilled and made more secure.³⁸⁷

384. Myres S. McDougal & Richard N. Gardner, *The Veto and the Charter: An Interpretation for Survival*, 60 YALE L.J. 258 (1951), reprinted in *STUDIES IN WORLD PUBLIC ORDER*, *supra* note 383, at 718.

385. See Myres S. McDougal & Norbert A. Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648 (1955), reprinted in *STUDIES IN WORLD PUBLIC ORDER*, *supra* note 383, at 763.

386. Myres S. McDougal, *Perspectives for an International Law of Human Dignity*, *PROCEEDINGS, A.S.I.L.* 107 (1959), reprinted in *STUDIES IN WORLD PUBLIC ORDER*, *supra* note 383, at 987.

387. *Id.* at 989-90.

Emphasizing the place of theory, McDougal writes:

I will rather simply recommend the continuous employment, in our specialized roles, of a certain process of thought—a frame of reference, a method of inquiry, a disciplined and contextual mode of analysis—intended to promote the most effective use of our minds in bringing to bear upon inquiry and specific choice the most relevant findings and techniques of contemporary science and technology.³⁸⁸

It is clear that for McDougal, international politics was amenable to policy science.

As I have emphasized, McDougal is forthright about his Cold War message, but it is interesting how over the one thousand pages of the *Studies in World Public Order*, the overall message is not so much about a confrontation with totalitarian regimes as it is about the science of creating a worthy world public order. McDougal's 1952 essay, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*,³⁸⁹ announces its politics in its title. However, despite the various footnotes to anthropologists like Bronislaw Malinowski and Margaret Mead and other social scientists like Charles Merriam, Talcott Parsons, and Abram Kardiner, he uses these references to address value shaping and value analysis. And despite a reference to "myth" following a citation to Franz Neumann, whose *Behemoth* provided a social-economic analysis of the Nazi state,³⁹⁰ McDougal's social science did not share the psychopathology so prevalent among American social scientists.³⁹¹

McDougal in an essay coauthored with Harold Lasswell ends with a reference to "'our time of trouble' and 'age of anxiety.'"³⁹² The challenge is there, even if the references are in quotation marks that hedge how much McDougal and Lasswell think of it as truly a time of trouble and an age of anxiety:

As a contemporary step in the direction of such universality it is imperative that spokesmen for the field of international law cease proclaiming the present universality of international law and drop the assumption that it is a matter of indifference what

388. *Id.* at 990.

389. Myres S. McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 1 AM. J. COMP. L. 24 (1957), reprinted in *STUDIES IN WORLD ORDER*, *supra* note 383, at 947.

390. FRANZ NEUMANN, *BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM, 1933-1944* (rev. ed. 1944) (1942).

391. See McDougal, *supra* note 389, at 958 n.30, 959.

392. Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 A.J.I.L. 1 (1959), reprinted in *STUDIES IN WORLD PUBLIC ORDER*, *supra* note 383, at 3, 41.

system of public order achieves universality. This is the challenging opportunity that “our time of trouble” and “age of anxiety” offers to all scholars everywhere.³⁹³

Because I am attempting to set legal writers apart from social and political science writers, it would, of course, be instructive to compare McDougal with his main collaborator, Harold Lasswell, the political scientist McDougal enticed from the University of Chicago to team-teach courses at the Yale Law School. Lasswell had written books in the 1920s and 1930s with titles like *Propaganda Technique in the World War*, *Psychopathology and Politics*, and *World Politics and Personal Insecurity*.³⁹⁴ Indeed, his *World Politics and Personal Insecurity* ends its final chapter, “In Quest of Myth,” by observing resignedly: “Clearly, insofar as politics is the management of symbols and practices related to the shape and composition of the value patterns of society, politics can assume no static certainty; it can strive for dynamic techniques of navigating the tides of insecurity generated within the nature of man in culture.”³⁹⁵ There is a level at which Lasswell retains some of the imprint of the social science anxiety that I have described more broadly. Despite the hyper-taxonomical language of *Power and Society*, which Lasswell published with political philosopher Abraham Kaplan in 1950,³⁹⁶ there is a much greater sense of continuity between liberal and oppressive societies than in any of the essays in *Studies in World Public Order*. On the other hand, it is also true that Lasswell felt that social theory during the interwar period had failed in its policy-forming role.³⁹⁷ And it is interesting to note that as McDougal grew in stature and confidence, their team-taught course, which was originally entitled “Property in a Crisis Society,” evolved into the Yale staple, “Law, Science and Policy.”³⁹⁸

This Article is not the place to work out the varying contributions and attitudes of Myres McDougal and Harold Lasswell, but what is particularly important for my argument is their shared effort to train lawyers as policy practitioners, starting with their manifesto in the *Yale Law Journal* in 1943 entitled *Legal Education and Public*

393. *Id.* at 40-41.

394. LASSWELL, *supra* note 89; HAROLD D. LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* (1930); LASSWELL, *supra* note 95.

395. LASSWELL, *supra* note 95, at 285.

396. HAROLD D. LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY* (1950).

397. See Harold D. Lasswell, *The Relation of Ideological Intelligence to Public Policy*, 53 *ETHICS* 25 (1942), cited in DUXBURY, *supra* note 382, at 168.

398. See Andrew R. Willard, *Myres Smith McDougal: A Life of and About Human Dignity*, 108 *YALE L.J.* 927, 930 (1999).

*Policy: Professional Training in the Public Interest.*³⁹⁹ Neil Duxbury chronicles the Harvard alarm at Lasswell and McDougal's proposals as an attack on the Langdellian tradition so dear to those in Cambridge, but Duxbury notes that W. Barton Leach's "own views regarding the future development of legal education were not all that far removed from those of Lasswell and McDougal."⁴⁰⁰ In a very important sense, McDougal's international law—despite its Cold War content—expresses the same confidence in the proactive role of government in the international scene as he talks of a "World Public Order," as well as a confidence in the lawyer's deep attachment to this order.

IV. CONCLUSION: THE TWO CULTURES

My analysis of a selection of major legal writings from the postwar period has suggested that the psychopathology of mass culture and mass society, as well as the pressing fear of totalitarianism—both so prominent in the social and political science writing of the postwar period—did not seem to command the same obsessive power in legal writing. What I would like to argue is that totalitarianism was not stage-front in postwar legal writing, not so much because it possessed power in absence but rather because the anxieties expressed by the social and political sciences simply were not shared by legal writers. I will suggest several reasons for this divergence—part of it based in biographical differences, such as the number of émigré scholars in social and political science and the greater extent of the administrative agency experience of law professors. But ultimately, the lack of palpable anxiety speaks to a confidence in government that derives from the core institutional culture of the legal academy.

I am referring here not just to the culture of the postwar period, but rather to a culture or intellectual style that has tremendous resilience and sharply separates law from other disciplines. At the end of this Article I turn to Laura Kalman's discussion of "legal liberalism's" faith in the courts and suggest that it has wider application than Kalman suggests. I will then turn to Duncan Kennedy's *A Critique of Adjudication* as exemplary of this intellectual style. Some of Kennedy's critics have always seen the Harvard Law School professor as the ultimate insider; I would like to describe his "internal critique" of the law as finally more internal than critical—and Kennedy's book underscores the point that, interdisciplinary infusions aside, legal academics are set apart in their

399. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

400. DUXBURY, *supra* note 382, at 189.

intellectual style.

Throughout the twentieth century there has been a great deal of cross-pollination not just among the American legal realists and the contemporary “law and” movements. It was, for example, absolutely typical of Felix Frankfurter that he wrote a foreword to the published proceedings of the 1949 University of Wisconsin conference on regionalism in America edited by the historian Merrill Jensen.⁴⁰¹ And we should remember that both Daniel Boorstin and David Riesman were trained as lawyers, and there was a range of faculty cross-listings between law schools and social science departments, as with Lasswell and Hurst. Nevertheless, despite the cross-pollination and the cross-listing, legal thought has maintained a separate intellectual style throughout.

A. The Gregarious Crowd

I have named Robert Jackson’s *The Supreme Court in the American System of Government* as one of the few exceptions where preoccupation with the totalitarian threat came to the fore in legal writing. But even Jackson’s book, which began with a confrontation with communism, Nazism, and fascism and ended by discussing the maintenance of a “system of free political government,”⁴⁰² spent most of its pages far afield from the threat of totalitarianism. Jackson’s discussion of oil and gas law and his passages on the Tenth Amendment have little to do with a totalitarian threat to the democratic state.

A number of scholars, including Morton Horwitz, Laura Kalman, Gary Peller, Edward Purcell, and Richard Primus, have located one of the key sources of the legal writing of the 1950s in its confrontation with totalitarianism. Rather than suggesting that the confrontation with totalitarianism fell short of being a formative experience for the legal writers of the 1950s, I have argued that the legal writing of the 1950s lacked the expressive fear of totalitarianism so prevalent in social and political science writing. Rarely in the legal writing of the postwar period did one confront the anxiety about the totalitarian potential of modern society and the portrait of a pathological mass culture found in social and political science writing.

As I have suggested, many of the postwar jurisprudential developments—such as the turn to process and the rush to standards, whether as renewed morality or procedural focus (e.g., Wechsler’s

401. Felix A. Frankfurter, *Foreword* to REGIONALISM IN AMERICA at xv (Merrill Jensen ed., 1965) (1951).

402. JACKSON, *supra* note 168, at 81.

neutrality)—may very well have developed as responses to totalitarianism. When Eugene Rostow in 1962 identified the turn to standards as a response to communism and fascism in anticipation of Edward Purcell's *The Crisis of Democratic Theory*,⁴⁰³ he probably correctly identified the importance of totalitarianism in that development. Although the jurisprudential climate of the 1950s is traceable to a confrontation with totalitarianism, it is significant that one has to go through the act of tracing because the totalitarian threat is not foregrounded to the degree it is in the social and political science writing of the same period.

With our present commitment to the hermeneutic turn, one might ask why I should put an emphasis on the explicitness of totalitarianism anxieties. Certainly, there are many theories that find presence in absence and that privilege the unstated. One might turn to Anna Freud's identification of "denial" as one of the basic defense mechanisms of the ego⁴⁰⁴ and find in the absence of expressed anxiety its opposite. In essence, the ego has learned to defend itself by *not* pronouncing the source of its own anxiety. One might make the more mundane observation that the unstated is often too obvious to state—because everyone was so completely aware of the power of totalitarian anxiety, there was little need to identify its presence. And, finally, there are several versions of the hermeneutic turn whereby absence implies presence, and meaning may be decoded from that very absence. All of that may be true, and in general, silences in legal writing often bear witness. Nevertheless, those interpretations fail to explain the differences between social science and legal writing; they do not explain why social and political science writing is so much more deeply emotive in its response to totalitarianism than is the legal writing of the postwar period. That emotive element is a presence that must be accounted for.

One of the telling differences between postwar social science departments on the one hand and the law schools (and the bench) on the other was the significant presence of refugee scholars in the former. *The Intellectual Migration*, edited by Donald Fleming and Bernard Bailyn, includes chapters on the refugee scholars in psychology, literary criticism, and art history and chapters on individual members of the Frankfurt School, but no discussion of refugee legal scholars.⁴⁰⁵ Numerous refugees trained as lawyers in Europe were unable to use their legal training directly in the United

403. See ROSTOW, *supra* note 366, at 21 n.26 (1962).

404. See ANNA FREUD, *EGO AND THE MECHANISMS OF DEFENSE* (1937).

405. *THE INTELLECTUAL MIGRATION: EUROPE AND AMERICA, 1930-1960* (Donald Fleming & Bernard Bailyn eds., 1969).

States and turned to the humanities and social sciences—one thinks, for example, of Arnold Brecht, Otto Kirchheimer, and, of course, Franz Neumann, whose *Behemoth* was one of the centerpieces of the analysis of totalitarianism.⁴⁰⁶ The story of the refugee scholars at the New School for Social Research is quite suggestive of the importance of totalitarianism within the social sciences and the humanities.⁴⁰⁷ This is certainly part of the explanation, and, as mentioned above, Wilfred McClay's chapter on the confrontation with totalitarianism in his study of individualism and community in the culture of modern America is subtitled "The Mind in Exile" and places enormous emphasis on the impact of émigré writers like Arendt and Fromm—unfortunately without explaining why their views of totalitarianism and mass society resonated in the American academy.⁴⁰⁸

Instead of focusing on the peculiarities of the social and political science writers of the postwar period, I would like to turn to the institutional culture of the law school and discuss what I have earlier called its paired worldly and otherworldly pull away from concerns about the totalitarian state. By worldly, I mean quite concretely the worldly experience of the lawyers in the administrative state, and by otherworldly, the self-absorption of the judicial function of the law with its sacral representations.

Just as the impact of the refugee scholar on the social sciences colored the social scientific values of the postwar period, so too did the New Deal experience of the judge and the law professor have an impact on how the role of government, and deviation from its correct functioning, were viewed. If a number of significant historians, as well as the psychoanalysts of the Frankfurt School, spent the war in the Research and Analysis Department of the Office of Strategic Services analyzing and combating the Nazi state,⁴⁰⁹ many lawyers

406. On this point it is telling that James Herget's chapter "The Migrant Scholars, 1940-1970" focuses on Edgar Bodenheimer, Friedrich August von Hayek, Hans Kelsen, and Otto Kirchheimer. Bodenheimer taught at the University of Utah Law School and Kirchheimer was cross-listed at the Columbia Law School. Herget notes at the end of a footnote on Kirchheimer's writings: "Most of his English-language materials appeared in political science periodicals." JAMES E. HERGET, *AMERICAN JURISPRUDENCE, 1870-1970: A HISTORY* 282 n.42 (1990).

407. See CLAUS-DIETER KROHN, *INTELLECTUALS IN EXILE: REFUGEE SCHOLARS AND THE NEW SCHOOL FOR SOCIAL RESEARCH* (Rita & Robert Kimber trans., Univ. of Massachusetts Press 1993). One is reminded of the work directly on the subject of totalitarianism by Emil Lederer, Max Ascoli, Arthur Feiler, Eduard Heimann, and, most significantly, Hannah Arendt. It is McClay's contention that the émigré scholars were at the epicenter of the interpretation of American society through the prism of totalitarianism. See MCCLAY, *supra* note 102, at 189-225.

408. See MCCLAY, *supra* note 102, at 189-225.

409. Barry Katz provides an excellent analysis of the role of historians and other social scientists in the Office of Strategic Services as well as its impact on the postwar development of the social sciences. See BARRY M. KATZ, *FOREIGN INTELLIGENCE: RESEARCH AND ANALYSIS IN THE OFFICE OF STRATEGIC SERVICES, 1942-1945* (1989). Peter Novick also

who would later find themselves on law school faculties and on the bench cut their teeth in jobs at the various alphabet soup agencies of the New Deal. Charles Wyzanski had been Solicitor for the Department of Labor, and Paul Freund held posts at the Department of the Treasury and the Reconstruction Finance Corporation. Similarly, Herbert Wechsler held several positions in the federal government, as did Henry Hart, including a stint in the Office of Price Administration. Indeed, to this last point, Eskridge and Frickey have provided a list of the future law professors who worked as lawyers in the OPA.⁴¹⁰ Edmund Cahn held a position as Corporation Counsel for the City of New York. And during the war, Myres McDougal was Assistant General Counsel in the Lend-Lease Administration and General Counsel in the Office of Foreign Relief and Rehabilitation Operations.⁴¹¹ This is not to say that there were not social scientists, especially economists like John Kenneth Galbraith, recruited by the new administrative agencies; indeed, social scientists, like Hofstadter, often saw themselves as political experts.⁴¹² But the presence of lawyers in the New Deal was greater and the assumed proximity to government that much clearer. In large part, the New Deal lawyers who worked in the administrative state retained a residual commitment to it. It was, consequently, less likely that they would voice serious criticism of the goals and processes of government. To this point, Hart and Sacks's *The Legal Process* represents, fundamentally, a celebration of the affirmative role and functioning of the administrative state in the voice of administrative insiders.

In 1948, Joseph Rosenfarb, who had worked for the National Labor Relations Board, published a book tellingly entitled *Freedom and the Administrative State*.⁴¹³ Significantly, Rosenfarb's final chapter was devoted to the topic of "Freedom through Government." We have already seen that one of the themes in postwar legal writing was the affirmative role of government and its contribution to the conditions of freedom. We should understand, then, that the New Deal experience with its concomitant confidence in the affirmative role of the administrative state and in the efficacy of democratic institutions encouraged a confident view of government and society in postwar legal writing.

On the other side of the worldly/otherworldly pairing of the bench

asserts that "by far the most significant wartime occupation for historians was intelligence analysis for the Office of Strategic Services." NOVICK, *supra* note 42, at 302.

410. See Eskridge & Frickey, *supra* note 257, at lxxviii.

411. See Willard, *supra* note 398, at 930.

412. See MORTON, *supra* note 36, at 121.

413. JOSEPH ROSENFARB, *FREEDOM AND THE ADMINISTRATIVE STATE* (1948).

and the law school was the historic self-absorption of the courts and the judicial function. Learned Hand's priestly self-imaging is just one part of the Frankfurter-Hand-Wechsler sacralization of the judiciary. As much as legal scholars participated in the legal realist desacralization of the formalist judiciary, they participated in a resacralization of the judicial function. Wechsler's "neutral principles" and Fuller's "inner morality" represented attempts in the post-legal realist environment to redefine the act of judging as sacred. Admittedly, the law evolves with society; there can be no eternal truths. And yet, Wechsler and Fuller, along with other legal process thinkers, moved from substance to process to identify their truths.

The preoccupation with the role of the courts—especially the old liberal worries of Frankfurter, Hand, and Wechsler about the abuse of the judicial function—has little to say about the threat of totalitarianism.⁴¹⁴ Fuller and others may have talked about the role of a positivist jurisprudence in the rise of Nazism, but in the end it is difficult to identify the judiciary, even at its most abusive, as a real totalitarian threat. If this otherworldliness might occasionally coincide with a poignant quote from Walter Lippmann about the "public philosophy," in the final analysis it represented a very different sort of threat than the threats that permeated much of postwar social and political science writing.

If we are, indeed, able to locate the sociological and ideological sources of these differences in emphasis on the totalitarian threat between social science writing and legal writing, these differences were formative for the later criticism leveled against both groups. It should, for example, be expected that the critics of the postwar social and political science writers would see their totalitarian angst in Cold War terms and overemphasize the "consensus" in the consensus historians. Similarly, the resacralization of the judicial function of the otherworldly side of 1950s legal writing invited Gary Peller's "Neutral Principles" critique while the worldly side invited a critique of the legal system as dysfunctional.

B. The Strange Career of Legal Thought

If the patterns of postwar legal thought framed the critique that followed them, there is nevertheless a great deal of continuity between postwar legal thought and legal thought of the following decades. In the end, postwar and postmodern legal thought may not

414. Here one can think as well of Yale Law School Dean Fred Rodell's *Nine Men*, which was an all-out attack on the Court throughout its history for a wide variety of sins. See FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955* (1955).

be so dissimilar. In order to make this argument, I would like to use Laura Kalman's *The Strange Career of Legal Liberalism* as a point of departure. I would like to extend some of her observations about "legal liberalism" in the law faculty beyond the aims of her book, to suggest more broadly some enduring traits of legal writing that she has identified as legal liberalism.

At the beginning of her book, Kalman states that she uses the term *legal liberalism* to refer to trust in the potential of courts, particularly the Supreme Court, to bring about "those specific social reforms that affect large groups of people such as blacks, or workers, or women, or partisans of a particular persuasion; in other words, *policy change with nationwide impact*."⁴¹⁵

Her book is a tale of legal liberalism's "strange career," in part its staying power—or, as she puts it, "how law professors have kept the faith in what has been called 'the cult of the Court,' defined here as confidence in the ability of courts to change society for what judges believe is the better."⁴¹⁶

After discussing the evolution of the legal process school, Kalman sets off the process thinkers, with their focus on process and neutrality, and the proponents of the judicial activism reflected in the decisions of the Warren Court. For her, it is clear that they reside within the same tradition: "In the 1960s," she tells us, "two groups of law professors bickered, but theirs was a family quarrel between Warren Court activists and process theorists, two wings of the realist tradition."⁴¹⁷ In Kalman's narrative, the developments of the 1960s and the boldness of the Warren Court provided the perfect backdrop for legal liberalism in the law schools.⁴¹⁸ "The Warren Court," Kalman asserts, "made the 1960s a good time for the law schools. All aspects of society—even corporate law firms—seemed viable candidates for reform."⁴¹⁹ Indeed, in line with what I have described as the worldly aspect of legal writing, Kalman tells us that "[l]aw professors 'moved easily between the practical and academic worlds.' Through their students and their scholarship, they could even believe they ran the world."⁴²⁰ There was, it seemed, no question about the

415. KALMAN, *supra* note 23, at 2 (quoting GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 4 (1991) (emphasis in the original)).

416. *Id.* at 4 (citing JOHN BRIGHAM, *THE CULT OF THE COURT* (1987)).

417. *Id.* at 48.

418. In this context, Kalman does not cite Archibald Cox's paean to the Warren Court, with its telling subtitle. See ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* (1967).

419. KALMAN, *supra* note 23, at 49.

420. *Id.* (citing RICHARD POSNER, *OVERCOMING LAW* 82 (1995)).

efficaciousness of law⁴²¹ evidenced by either the Warren Court or the law professor.

Kalman depicts the law school in the atmosphere of the 1960s as far less troubled than other divisions of the university. In fact, she describes the law schools as rather untroubled: “The law schools remained apart from the revolution—in large part because their inhabitants perceived law to be in the vanguard of the revolution.”⁴²² Indeed, the liberal faith thrived in the law schools. If “[l]iberalism fared better in law than it did in other fields,” in the other fields “the compromise of liberalism, the breakdown of ‘law and order,’ and the war in Vietnam tarnished the concept by the decade’s end and led to disciplinary change.”⁴²³ Liberalism and its tenets were under siege outside the law schools.

It turns out that we did not wait long for the liberal faith in the law schools to come under challenge. As Kalman argues, the “arrival of law and economics and critical legal studies shattered the liberal consensus.”⁴²⁴ Nevertheless, what Kalman describes as a “shattering” is really more a temporary decline, for perhaps the centerpiece of Kalman’s story is the reemergence of legal liberalism in the “turn to history.”⁴²⁵ In an important sense, Kalman’s book is building to a point of narrative stasis, where Kalman can talk about the disciplinary differences between law and history.

In her discussion of the “turn to history,” particularly the adoption, via the Johns Hopkins historian J.G.A. Pocock and others, of the “republicanism” of the Founding, Kalman describes the difference between how historians and lawyers write history. Basically, lawyers delve into history because they are after a good legal argument. They need additional support for their brief. And, as we know, their brief is for legal liberalism. Perhaps in turning to republicanism, the academic lawyer chose the wrong vehicle: “Had they but realized it,

421. In the context of his discussion of Ronald Coase and Charles Reich, Gary Minda asserts that “[b]oth authors implicitly rejected traditional faith in the efficaciousness of the legal process and the autonomy of fundamental rights.” GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END* 73 (1995). Minda’s statement might suggest a rejection by them of specific legal movements, since a few pages later in his book he refers to the “growing disenchantment with the legal process and fundamental rights schools.” *Id.* at 83. But I think his statement about Coase and Reich’s rejection is clearly broader in its reference than a rejection of the two movements. I was particularly gratified to come across Minda’s reference to the “efficaciousness of legal process” because I had been thinking in terms of the legal scholar’s belief in the “efficaciousness of law” when I came across it (even if here it is a rejection) and found it to be a strong support for my argument. Minda, however, seems to indicate a narrower range of scholars who finally believe in the efficaciousness of law than I do, although the range he suggests is quite large. *See id.*

422. KALMAN, *supra* note 23, at 53.

423. *Id.* at 54-55.

424. *Id.* at 94.

425. Thus Kalman’s fifth chapter, “The Turn to History,” *see* KALMAN, *supra* note 23, at 132-63, follows the temporary demise discussed in the fourth chapter, “Crisis,” *see id.* at 101-31.

the neorepublicans might have seen that other new theories offered a more historically sensitive way of recapturing legal liberalism.”⁴²⁶ But what is most relevant in our context is not the turn to history, nor legal scholars’ identification with early modern republicanism, but the survival of legal liberalism.

Kalman’s book ends in an epilogue for the “strange career of legal liberalism.” This is another story of the demise of legal liberalism, perhaps final this time, resulting from the emergence of postmodernism in the legal academy. In this instance, legal academics, often trained in other disciplines, are more truly interdisciplinary than in past interdisciplinary attempts, so that Kalman can describe the narrowing of the “gap between law school and the university.”⁴²⁷ This does seem like the end of legal liberalism’s “career.” And yet, enough of the peculiarities of legal thinking remain that Kalman can quote John Schlegel to the effect that “[u]ntil one takes the ‘and’ out of ‘law and . . .’ there is no point in talking.”⁴²⁸ Here she can also quote Pierre Schlag to the effect that “when traditional legal thought goes traveling (in the footnotes) through the university, it never seems to encounter much of anything except itself. The interdisciplinary travels of traditional legal thought are like a bad European vacation: the substance is Europe, but the form is McDonald’s, Holiday Inns, American Express.”⁴²⁹

I would like to expand on this little subplot in Kalman’s epilogue, on her quotations from Schlegel and Schlag. Kalman’s pendulum narrative of the legal academic’s faith—that is, the faith in the courts as an engine of reform—is interesting in part because of the resilience of that faith. If one broadens the definition of legal liberalism to encompass the range of views of the postwar legal writers I have discussed in this Article and, consequently, to include a commitment to a broader array of legal institutions than the courts and a commitment to at least their reformability, some of the pendulum movements of Kalman’s narrative are muted. In fact, the legal process school, with its considerations of “institutional competency”—think of the five parts of Willard Hurst’s *The Growth of American Law* devoted to the legislature, the courts, the constitution makers, the bar, and the executive⁴³⁰—would then fit

426. *Id.* at 177.

427. *Id.* at 245.

428. *Id.* at 244 (citing JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 257 (1995)).

429. *Id.* at 244-45 (quoting Pierre Schlag, “*Le Hors de Texte, C’est Moi*”: *The Politics of Form and the Domestication of Deconstruction*, 11 *CARDOZO L. REV.* 1631, 1656 (1990)). In his survey of recent developments in legal thought, Gary Minda similarly quotes the same trenchant passage from Pierre Schlag. See MINDA, *supra* note 421, at 79.

430. See JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS*

more tightly into Kalman's story of legal liberalism. And this commitment to legal institutions or at least to their potential for reform, which I have located at the core of legal thought, may help to explain why postwar legal writers were so much less encumbered by the fear of totalitarianism than their counterparts elsewhere in the university.

This faith—whether or not one wants to call it “legal liberalism”—has been and remains at the core of legal writing and thinking. All of the various “law and” movements may be much closer to the core beliefs of the legal academy than their proponents have suggested. In his *Postmodern Legal Movements*, Gary Minda contends that “Arthur Leff was mistaken about the new ‘law and’ movements, as they were not really radical departures from traditional modes of legal thought at all.”⁴³¹ They “simply shifted the frame of analysis away from ‘applying the law to the facts’ (the traditional frame) to applying the theory to the law’.”⁴³² But, for Minda, the move from the “law and” movements to a full-bore postmodernism does represent a real change: “It is only now becoming clear that the new legal discourses of the ‘law and’ movements of the late 1970s and 1980s have themselves become transformed by a general disenchanted condition that has affected contemporary legal scholarship—*postmodernism*.”⁴³³ Indeed, he ends his chapter on postmodern jurisprudence by asserting: “For postmoderns, law cannot be an autonomous, self-governing activity because there are no fixed foundations on which one can ground legal justification once and for all.”⁴³⁴ That, of course, is a bit final for postmodernism, and I would argue that even in postmodern jurisprudence one can discern the elements of more traditional legal thinking. In the end, the disciplinary imprint is quite strong. Just as the progressive corporate law scholars who contributed to Lawrence Mitchell's *Progressive Corporate Law* had difficulty going beyond the facile economic psychologizing of the traditional law and economics style,⁴³⁵ legal academic writers in revolt maintain the imprint of their discipline much more than they tend to admit.

The tendency of Kalman and others to focus on a court-centered definition of legal liberalism reflects the unmistakable privileging of

(1950).

431. MINDA, *supra* note 421, at 79.

432. *Id.*

433. *Id.* (emphasis in the original).

434. *Id.* at 246.

435. See my discussion of the essays in *PROGRESSIVE CORPORATE LAW* (1995) in Carl Landauer, *Beyond the Law and Economics Style: Advancing Corporate Law in an Era of Downsizing and Corporate Reengineering*, 84 CAL. L. REV. 1693, 1698-708 (1996).

the court opinion in legal writing. The impact of a legal education that focuses on *casebooks* is clearly still with us a century after it was introduced by Langdell. Even courses that should focus on regulation, such as securities law and tax law, are taught primarily out of casebooks that emphasize court opinions.⁴³⁶

The preoccupation with the courts can turn celebratory. The praise of the Warren Court in Morton Horwitz's *The Warren Court and the Pursuit of Justice*⁴³⁷ is noticeably more effusive than that of Archibald Cox's book on the Warren Court from thirty years earlier, *The Warren Court: Constitutional Decision as an Instrument of Reform*. While Cox still felt he needed to address the complaints of the neutral principle crowd,⁴³⁸ Morton Horwitz has no such concern:

For the first time, democracy became the foundational value in American Constitutional discourse, encouraging the Warren Court to redefine the relationship between judicial review and democracy. In the end, the Court managed to transcend the traditionally dichotomous treatment of judicial review and democracy as well as of liberty and equality.⁴³⁹

Horwitz's fulsome praise of the Warren Court, especially the role played by Brennan,⁴⁴⁰ is, of course, an implicit critique of the present Court, but it is unmistakably an expression of faith in the power of the Court as an institution to do good. For Horwitz, the Warren Court provides the model for the "pursuit of justice."

More interesting in this context than Horwitz's slim Warren Court book is Duncan Kennedy's *A Critique of Adjudication*, for it provides a self-conscious expression of just how embedded in many traditional values of the legal culture critical legal studies has been all along. Kennedy clearly retains a critical identity—the "critique" of the title. After defining "modernism/postmodernism" (which he will abbreviate as "mpm" through his book) as "a project with the goal of achieving transcendent aesthetic/emotional/intellectual

436. A century after the invention of the case method, the casebook is so dominant in legal education that the professor of my law school corporate finance class insisted on calling the course's textbook, Brealey and Myers's *Principles of Corporate Finance*, a "casebook" despite the fact that Brealey and Myers had little interest in the securities law docket of the Second Circuit. See RICHARD A. BREALEY & STEWART C. MYERS, *PRINCIPLES OF CORPORATE FINANCE* (3d ed. 1988).

437. See MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998).

438. "[T]here will be few who, if they could relive recent history, would choose to exchange closer attention to conventional legal doctrines for the great strides taken under the leadership of the Warren Court in civil rights, the strengthening of democratic self-government, and the administration of criminal justice." COX, *supra* note 418, at 23.

439. HORWITZ, *supra* note 437, at xii.

440. "Brennan, who was to become the most important intellectual influence on the Warren Court, would also rank as one of the greatest justices in the nation's history." *Id.* at 8.

experiences at the margins of or in the interstices of a disrupted rational grid,”⁴⁴¹ he tells us: “I have pursued my own version of a left/mpm project in the context of American critical legal studies”⁴⁴² He begins a short subsection entitled “Subversion” by stating: “This book is part of the long-running project of the critique of judges, and for that reason has subversive aspirations.”⁴⁴³ But at the end of that short subsection, we find someone who is not so radically subversive:

So here are my thoughts, first about the rule of law, and second about Reason, or at least about “objectivity.” In each case, I want to say that, yes, I am a “believer,” *but* that, in my versions, the ideals in question have only a little of the radiant authority that Liberal theorists have hoped for them.⁴⁴⁴

We may not have Learned Hand’s judge “cloaking himself in the majesty of an overshadowing past,”⁴⁴⁵ but we are closer than we may have thought.

Indeed, Kennedy repeatedly makes clear that his critique is and has been an *internal* critique of adjudication, so that he can matter-of-factly state: “Like other crits who have worked on the internal critique of legal reasoning, I’ve argued all along”⁴⁴⁶ But I want to emphasize that Kennedy’s book is not only an “internal critique”; it is a critique of *adjudication*. On the first page of his introduction, Kennedy tells us that the “main question addressed is the role of political ideology . . . in the part of judicial activity that is best described as law making.”⁴⁴⁷ And he goes on to explain that “judicial law making has been the vehicle of ideological projects of this familiar kind and of other kinds, but that ideologically oriented legal work is different from ideologically oriented legislative work.”⁴⁴⁸ Kennedy then explains how ideology enters legal decision making:

The law-making activity of judges takes place in the context of a structure of legal rules, in the face of a particular gap, conflict or ambiguity in the structure. Judges resolve interpretive questions through a form of work that consists in restating some part of this structure and then deploying a repertoire of legal arguments

441. See KENNEDY, *supra* note 31, at 7.

442. *Id.* at 8.

443. *Id.* at 12.

444. *Id.* at 12-13 (emphasis in original).

445. Learned Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361 (1939), reprinted in HAND, *supra* note 5, at 129, 130.

446. KENNEDY, *supra* note 31, at 60. Kennedy, in fact, traces the lineage of his “internal critique” to the more radical among the legal realists and can speak of “the emergence of an internal critique of adjudication.” *Id.* at 88.

447. *Id.* at 1.

448. *Id.*

to justify their solutions. The most important mode of influence of ideology in adjudication comes from the interpenetration of this specific technical rhetoric of legal justification and the general political rhetoric of the time.⁴⁴⁹

In Kennedy's book, then, there is a certain givenness to his adjudicatory environment. Kennedy does not reject deductive logic. He argues that

it is common to believe that deduction is "formalism," an invalid, discredited method of decision, and that nowadays we reject it in favor of policy. This seems wrong to me. The judges and treatise writers Fuller and Perdue criticized made a wrong deduction. But this doesn't mean we don't still use their method.⁴⁵⁰

Duncan Kennedy is Duncan Kennedy after all, and he would not want his critique to be too domesticated, so he talks about a "viral strain" of criticism of American law. That way he can suggest it is internal to the "host" of the adjudication and is still dangerous and threatening. Kennedy describes the "birth" of the virus:

At the turn of the century, the United States experienced a long period of conservative judicial and liberal legislative control, one that looked as though it might go on forever. Most liberals simply continued arguing that each specific conservative judicial decision was judicial legislation because there was a right legal answer that the court disregarded in favor of its own subjective ideological preference. But some liberals "couldn't take it anymore" and began to argue that the problem was that there were no correct legal answers to these questions. This was the moment of the American mutation, the "birth of the virus."⁴⁵¹

Having described the beginnings of the "viral strain," Kennedy offers that "[t]his book is an attempt to develop and extend this American form of internal critique. To my mind, it is mainly through this project, rather than through philosophy or political theory, that American intellectuals have been participants in the larger, worldwide long-running project of left/mpm critique."⁴⁵²

Kennedy's focus on "American intellectuals" here is quite important. Not only does he locate the source of his interest in appellate court opinions as deriving from his profession,⁴⁵³ but the law professor also assumes a significant role in his story. He will talk

449. *Id.*

450. *Id.* at 104.

451. *Id.* at 81.

452. *Id.* at 82.

453. "My choice to focus on appellate decisions reflects, of course, my own specialization as a teacher of legal doctrine to law students in a law school." *Id.* at 66.

a great deal about “intellectuals” and “intelligentsias.” Part of his answer to when “we call a conflict over the definition of a rule of law . . . ‘ideological’” is when there is a “recognizable ‘body of thought,’ a discourse, a sequence of texts, that can be ‘applied’ or brought to bear over and over again to produce arguments in favor of rule definitions that will favor the [implicated] interest. This means an intelligentsia.”⁴⁵⁴ If Kennedy is self-conscious about the critique of mpmm as “an elite project,”⁴⁵⁵ there is the little question that the protagonist of the critique of adjudication is the law professor and, significantly, the real work is done in the legal academy rather than on the bench.

I have introduced Kennedy’s *A Critique of Adjudication* because it helps to point to the fact that the American legal academy—even in some of its most critical moments—has strong ties to the institutions of government. In Kennedy’s book, law professors clearly have something to do with the development of policy. Similarly, Dan Danielsen and Karen Engle called the last section of their introduction to *After Identity*, “A Post-identity Policy Proposal.”⁴⁵⁶ Professors of law are engaged in the forging of policy. Another way to look at this conjunction of professors and policy is to understand that, ultimately for legal academics, the law schools and their law reviews are political institutions. But this is not new. Not only have law professors had a positive relationship to the political institutions of the country—or in their most critical moments at least to their reformability—by comparison to their peers in the university, but they have also seen the law school as having a part to play in American policy formation. Like the courts, they have viewed the law school as at once cloistered and politically connected. In a sense, I am taking Pierre Schlag’s suggestion that not only is legal thought dominated by normativity but it also “assumes that its own categories and grammar resonate deeply and authentically within the culture in such a way that normative legal thought can be effective in transforming and regulating the culture,”⁴⁵⁷ and I am extending it beyond the court-dominated fora of Schlag’s essay. Thus, if postwar legal writers were less troubled by fears of totalitarianism than their peers in the social and political sciences, it was in part because the law school was imbued with a commitment to the institutions of American government and to its own political role within them. In

454. *Id.* at 41.

455. *Id.* at 353.

456. See DAN DANIELSEN & KAREN ENGLE, *Introduction* to AFTER IDENTITY: A READER IN LAW AND CULTURE, at xiii, xvii (1995).

457. Pierre Schlag, *Normativity and the Politics of Form*, in PAUL E. CAMPOS ET AL., AGAINST THE LAW 29, 58-59 (1996).

an important sense, that commitment may still be with us.

In *Patterns of American Jurisprudence*, Neil Duxbury has provided us a great service by writing an extended analysis that challenges what he describes as the “basic pendulum-swing vision of American jurisprudential history.”⁴⁵⁸ Duxbury, in taking up the story from the so-called formalism of Langdell and others, is able to trace each pendulum swing of revolt back through earlier precedents. In the end, the pendulum swings do not look very dramatic, and there is a realism to formalism and a formalism to realism. I would like to take Duxbury’s undermining of the “episodic conception”⁴⁵⁹ of American jurisprudence perhaps one step further and attempt to identify not so much “patterns of American jurisprudence” as *a* pattern of American jurisprudence. My own view, suggested by the legal community’s relative immunity to totalitarian anxieties, is that there are core values in American legal thinking about its function and about its relationship to governance, and these have had a long vitality. When Robert Post, at the end of his reference to Joseph Biden’s comments about Lani Guinier during the controversy about her nomination to head the Justice Department’s Civil Rights Division, writes: “Ensclosed in the narrow world of law reviews, we are apt to forget Arendt’s harsh warning of the tension between truth and politics. We are apt to confuse our truth with power,”⁴⁶⁰ he hits upon the core of my analysis. Similarly, in an extended introduction to his call for a cultural study of law, Paul Kahn describes the instrumental reformist identity of legal scholarship in America. “Our legal theorists,” he contends, “celebrate the identity of theory and practice.”⁴⁶¹ Indeed, Kahn observes the difference between political scientists and legal academics: “Political scientists can study government without confusing their activity with the object of their study.”⁴⁶² In what might look like a strange worldly/otherworldly binary, American legal thought has been assured of its special place. That place is symbolized outwardly by courtly accouterments, whether the black robe or *The Bluebook*, but more substantially by its idioms of style and thought that remain lodged in every revolt. And those idioms tend to live on in a confidence in the policy relevance of legal thinking. Even when cast as outsider dynamics, the insider confidence is still quite detectable.

458. DUXBURY, *supra* note 382, at 2.

459. *Id.* at 308.

460. Post, *supra* note 34, at 195.

461. PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 19 (1999); *see also id.* at 7-30.

462. *Id.* at 27.